United States Court of Appeals for the Second Circuit

APPENDIX

ORIGINAL

77-1216

B P/S

IN THE

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

against

CHAIM KAHAN, SOLOMON WERCBERGER and
MOR WERCBERGER,

Defendants-Appellants.

ON APPEAL FROM JUDGMENTS OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' APPENDIX

VOLUME 1 — 1a to 414a

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UNITED STATES COURT OF APPEALS
FILED
JUN 3 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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Ia

E/ Assigned Trial
TRATE
01 Office
Disp./Sentence

U. S. vs. ~~75 CR 762-7~~
defendant

Day 16 Mo. 10 75 762
No. of Defdnts 7

OFFENSES

		COUNTS
18-659 & 2	Theft of goods in i.c.c.	2

CASE NO.
BAIL
☐ Denied
AMT Set (000) $ 25
date
☐ Bail Not Made
☐ Bail Status Changed (See Docket)

TORNEYS

U.S. Attorney or Asst
Corcoran

Defense: ☐ CJA, ☒ Ret., ☐ Waived, ☐ Self, ☐ None ☐ Other, ☐ PD, ☐ CD

~~S. Thal~~
~~666 Fifth Avenue~~
~~NYC. 586-3722~~

Harry Youtt
919-3rd Ave NYC
751-3300

ARREST		INDICTMENT ☒ / Information ☐	ARRAIGNMENT		TRIAL	
U.S. Custody Began on Above Charges	☐ High Risk Defn. & Date Design'd	10-16-75	10/24/75	Trial Set For 12/1/75	Voir Dire 1/17/77	Disposition
☐ Prosecution Deferred		Waived ☐	1st Plea "	☒ Not Guilty ☐ Nolo ☐ Guilty	Trial Began "	☐ Convict. ☐ Acquittal ☐ Dismissal ☐ Nolle
		Superseding ☐ Indict/Info ☐	Final Plea	☐ Not Guilty ☐ Nolo ☐ Guilty	Trial Ended 1/25/77	

		DATE	INITIAL/No.	
Search Warrant	Issued			
	Return			
Summons	Issued			
	Served			
Arrest Warrant				
COMPLAINT		3/14/75	MS 070 B	
OFFENSE (In Complaint)		Theft of goods in i.c.c.		

INITIAL APPEARANCE — INITIAL/No.

PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled; Date Held
☐ Waived
☐ Not Waived
☐ Intervening Indictment
Tape No. — INITIAL/No.

OUTCOME
☑ Dismissed
☐ Held for District GJ
BOND ☐ Exe ☐ To
☐ Held to Answer to U. S. District Court
AT:
Magistrate's initials MS

ISTRATE

• Show last names and suffix numbers of other defendants on same indictment/information

GOMEZ 1; DIAMOND 2; SANTA 3; MALONEY 4; KAHAN 5; S. WERCBERGER 6

DATE	PROCEEDINGS
10-16-75	Before Neaher, J - Indictment filed - ordered sealed by the Court.
10-21-75	Before Mishler, Ch J - Indictment ordered unsealed by the court on consent of AUSA Corcoran.
10/24/75	Before MISHLER, CH.J.-Case called- Deft and counsel present deft arraigned and enters a plea of not guilty-deft to be released upon execution of $25,000.00 P.R. Bond- bail limits extended to included Conn and J.J. -trial scheduled for 12/1/75.
11/5/75	Letter from Hary Youtt dated 11/4/75 filed
11/5/75	Letter from Judge Mishler, dated 11/5/75 that time for pre-trial discovery is extended to 11/21/75
11-18-75	Notice of Motion filed and Memorandum of Law, ret.11-21-75 for severance, Bill of Particulars, Inspection, Suppression right to speedy trial, etc.
11-18-75	Notice of Readiness for Trial filed
11-21-75	Before Mishler, Ch J -Motion to dismiss - argued and denied (see order on back of motion papers) Case called for Pre-Trial Conference - Pre Trial conferende held and concluded - trial reset for trial on 2-23-76.

V. Excludable (a) (b)

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV BETWEEN SECTION V ANY OCCURRENCE OF EXCLUDABLE

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
2-2-76	75 M 1847 inserted in CR file				
2-23-76	Before MISHLER, CH J - case called - adjd to Mar. 29, 1976 for trial on consent.				
3-2-76	Notice of Motion filed, ret. Mar. 19, 1976, for suppressing evidence, etc.				
3/17/76	Copy of letter from Steven Thal dated 3/16/76 filed				
3-29-76	Before MISHLER, CH J - case adjd to May 24, 1976 for trial on consent				
3-29-76	Certificate of Engagement and Memorandum to all counsel filed setting trial date for 5-24-76				
5/24/76	Before MISHLER, CH. J.- case called- adjd without date for trial				
6-8-76	Letter filed received from Chambers from counsel for the deft re adjournment of trial date.				
7-8-76	By MISHLER, CH J - Memorandum of Decision and Order dtd 7-6-76 denying motion to suppress filed.				
12-3-76	Before Mishler, J.- Case Called. 1-17-77 for Trial.	12-3-76 T			
12-13-76	Letter filed from counsel for the deft Harry Youtt and copy of letter to AUSA Corcoran filed attached thereto (recvd from Chambers)	1-17-77			
1-17-77	Before MISHLER, CH J - case called - deft & counsel present - trial ordered and begun - Jurors selected and sworn - trial contd to 1-18-77				
1-18-77	Before Mishler, J.- Case Called. Deft. & Counsel present. Hearing held on a motion to suppress. Hearing concluded. Motion to suppress denied as indicated on the record. Trial continued to 1-19-77 at 10:00 A.M.				
1/19/77	Before MISHLER, CH. J.- Case called. Deft &Counsel present. Trial resumed. Trial continued to 1/20/77 at 10:00 a.m.				
1.20.77	Before Mishler, J.- Case Called. Deft. present with Counsel. Trial resumed. Govt. rests. Motion of deft. for a judgment of acquittal is denied. Trial continued to 1-24-77 at 10:00 A.M.				
-24-77	Before MISHLER, CH J - case called - deft & counsel present - trial resumed - both sides rest - deft renews motion for judgment ofacquittal - denied - trial contd to 1-25-77				
1-25-77	Before Mishler, Ch J - case called - deft & counsel present - trial resumed - Jury retires to deliberate at 9:45 am. Jury returned with a verdict of not guilty on count 1 and guilty on count 2 - sentence adjd without date - all motions reserved to time of sentence. Order of sustenance signed for Lunch.				
-3-77	3 transcripts filed (one dated Jan. 18, Jan. 19 and Jan 20, 1977 respectively)				
3/18/77	Before MISHLER, CH.J.- Case called. Deft & Counsel present. Deft sentenced to a term of imprisonment on count 2 for a period of 3 years pursuant to T-18:4205 (b)(2). Court advised deft of his right to appeal. Bail continued pending appeal.				
/77	Judgment & Commitment filed. Certified copies to Marshals.				
-23-77	Notice of appeal filed. Docket entries and duplicate of Notice mailed to the court of appeals.				
-1-77	Transcript dated 11-21-77 filed				

Interval — Start Date — Ltr. Total

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET *U. S. vs*

MOR WERCBERGER

75 762
Yr. | Docket No. | De

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELA (a)	 (b)	 (c)	 (
4/8/77	Order feceived from the C of A that the record be docketed on or before April 26, 1977.				
4-22-77 k	Stipulation re inclusion of document s for record on appeal filed.				
4/22/-877	Record on appeal certified and mailed to court of appeals. JLJ				
4.27.77	Supplemental Record on Appeal Certified and delivered to the Court of Appeals by Kathleen Greenmun.				gr
5.3.77	Supplemental Record on Appeal Certified and delivered to the Court of Appeals by Kathleen Greenmun.				gr
5.4.77	Acknowledgment filed received from the Court of Appeals for the Record on Appeal.				
5.4.77	Acknowledgment filed received from the Court of Appeals. for the Supplemental Record on Appeal.				gr
5.9.77	Acknowledgment filed received from the Court of Appeals. for the Supplemental Record on Appeal.				gr

AO 256A

Interval (per Section II) | Start Date / End Date | Ltr. Code | Total Days

U. S. vs. SOLOMON WERCBERGER

Disp./Sentence X 75 CR 762-6 defendant

16 10 75 762

No. of Defdnts 7

MISHLER

MAGR. CASE NO.

CHARGES

OFFENSES — COUNTS

18-659 & 2 Theft of goods in i.c.c. 2

ATTORNEYS

U.S. Attorney or Asst.: Corcoran

Defense: CJA ✗ Ret. ☐ Waived ☐ Self ☐ None ☐ Other ☐ PD ☐ CD

S. ~~Thal~~
~~666 Fifth Avenue~~, NYC. 751-3300
~~586-3722.~~

Harry Youtt
919-3rd Ave NYC.

BAIL & RELEASE
☐ Denied
☑ Personal
☐ Unsecured
Conditional
AMT Set (000) $ 25
date
☐ Bail Not Made
☐ Bail Status Changed (See Docket)

INTERVALS / DATES

ARREST — U.S. Custody Began on Above Charges — or
☐ High Risk Detn. & Date Design'd
☐ Prosecution Deferred

INDICTMENT — Information ☐ 10-16-75
Waived ☐
Superseding ☐ Indict./Info ☐

ARRAIGNMENT 10/24/75
1st Plea
Final Plea
Trial Set For 12/1/75
☒ Not Guilty ☐ Nolo ☐ Guilty
☐ Not Guilty ☐ Nolo ☐ Guilty

TRIAL
Voir Dire ☑ 1/17/77
Trial Began ☑ J 1/19/77 ☐ N
Trial Ended 1/25/77

Disposition
☑ Convicted
☐ Acquitted
☐ Dismissed
☐ Nolled/Discontinued

SENTENCE 3/18

		DATE	INITIAL/No.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant			
COMPLAINT		3/14/75	NSOKB

INITIAL APPEARANCE	INITIAL/No.
PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled / Date Held; ☐ Waived ☐ Not Waived; ☐ Intervening Indictment	
Tape No.	INITIAL/No.

OUTCOME
☑ Dismissed
☐ Held for District GJ
☐ Held to Answer to U. S. District Court
AT:
BOND ☐ Exonerated ☐ To Transfer District
Magistrate's Initials

OFFENSE (In Complaint): Theft of goods in i.c.c.

• Show last names and suffix numbers of other defendants on same indictment/information

GOMEZ 1; DIAMOND 2; SANTA 3; MALONEY 4; KAHAN 5; ~~WERCBERGER 6~~ Mor WERCBERGER 7

V. Excludable Delay (a) (b)

DATE	PROCEEDINGS
10-16-75	Before Neaher, J- Indictment filed - ordered sealed by the Court.
10-21-75	Before Mishler, Ch J - Indictment ordered unsealed by the court on consent of AUSA Corcoran.
10/24/75	Before MISHLER, CH.J.- Case called- deft and counsel present deft arraigned and enters a plea of not guilty- deft to be released upon execution of $25,000.00 P.R. Bond-bail limits extended to include Conn.,and N.J.- trial scheduled for 12/1/75.
11/5/75	Letter from Harry Youtt dated 11/4/75 filed
11/5/75	Letter from Judge Mishler, dated 11/5/75 the time for pre-trial discovery is extended to 11/21/75
11-18-75	Notice of Motion filed and Memorandum of Law, ret.11-21-75 for dismissal, Inspection, Bill of Particulars, right to Speedy trial, for severance from the trial of other defts., suppression, etc.
11-18-75	Notice of Readiness for Trial filed
11-21-75	Before MISHLER, CH J - case called - motion to dismiss argued and denied (see order on back of motion papers) Case called for pre trial hearing - pre trial hearing held and concluded - case reset for trial on 2-23-76.

INDICATE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC §3161(h) — "SPEEDY TRIAL ACT"

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
-2-76	75 M 1848 inserted in CR file				
2-3-76	Before MISHLER, CH J - case called - adjd to Mar. 29, 1976 for trial on consent.				
3-2-76	Notice of Motion filed for suppressing evidence, etc. (3-19-76)				
3/17/76	Copy of letter from Steven Thal dated 3/15/76 filed				
3-19-76	Before Mishler, Ch J - case called - motion to suppress etc submitted - decision reserved.				
3-29-76	Before MISHLER, CH J - case adjd to May 24, 1976 for trial on consent				
3-24-76	Memorandum to all counsel and Certificate of Engagement filed setting case for trial on 5-24-76				
/24/76	Before MISHLER,CH.J.- Case called- adjd without date for trial				
6-8-76	Letter filed received from Chambers from counsel for the deft re adjournment of trial date.				
7-8-76	By MISHLER, CH. J. - Memorandum of Decision and Order dtd 7-6-76 denying motion to suppress filed.				
12-3-76	Before Mishler, J.- Case Called. 1-17-77 for Trial.		12-3-76		
12-13-76	Letter filed from counsel for the deft, Harry Youtt Esq. and copy of letter to AUSA Corcoran attached thereto filed		1-17-77		
1-17-77	Before MISHLER, CH J - case called - deft & counsel present - trial ordered and begun - Jurors selected and sworn. Trial contd to 1-18-77.				
1-18-77	Before Mishler, J.- Case Called. Deft. & Counsel present. Hearing held on a motion to suppress. Hearing concluded. Motion to suppress denied as indicated on the record. Trial continued to 1-19-77 at 10:00 A.M.				
1/19/77	Before MISHLER, CH. J. - Case called. Deft & Counsel present. Trial resumed. Trial continued to 1/20/77 at 10:00 a.m.				
1.20.77	Before Mishler, J.- Case Called. Deft. present with Counsel. Trial resumed. Govt. rests. Motion of deft. for a judgment of acquittal is denied. Trial continued to 1-24-77 at 10:00 A.M.				
1-24-77	Before MISHLER, CH J - case called - deft & counsel present - trial resumed - both sides rest - deft renews motion for judgment of acquittal - motion denied - trial contd to 1-25-77				
1-25-77	Stenographers transcript filed dated Jan. 17, 1977				
1-25-77	Before Mishler, Ch J - case called - deft & counsel present - trial resumed - Jury retires to deliberate at 9:45 am - at 1:45 PM Jury returned with a verdict of not guilty on count 1 and guilty on count 2. Jury polled and discharged - trial concluded - all motions reserved to date of sentence - sentence adjd without date - Order of sustenance signed for Lunch.				
-3-77	3 stenographers transcripts filed (one dated Jan. 18, Jan 19 and Jan. 20,1977 respectively)				
/18/77	Before MISHLER CH.J.- Case called. Deft & Counsel present. Deft sentenced to a term of imprisonment on count 2 for a period of 3 years pursuant to T-18:4205 (b)(2). Court advised deft of his right to appeal. Bail continued pending appeal.				
/18/77	Judgment & Commitment filed. Certified copies to Marshals.				
		(a) Interval	(b) Start Date	(c)	(d)

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

SOLOMON WERCBERGER

75 762 -
Yr. Docket No.

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE D (a)	(b)
3-23-77	Notice of appeal filed. Docket entries and duplicate of Notice mailed to the court of appeals.		
4-7-77	Transcript filed dated 11-21-75		
4/8/77	Order filed received from the C of A that the record be filed on or before April 26, 1977.		
4-22-77	Stipulation re inclusion of documents for record on appeal filed.		
4/22/77	Record on appeal cert & mailed to C of A.JLJ		
4-25-77	Two transcripts filed dated Jan. 24 and Jan. 25,1977 respectively. rs		
4.27.77	Supplemental Record on Appeal Certified and delivered to the Court of Appeals by Kathleen Greenmun.		
4-28-77	Transcript filed dated 3-19-76.		
5.3.77	Supplemental Record on Appeal Certified and delivered to the Court of Appeals by Kathleen Greenmun.		
5.4.77	Acknowledgment filed received from the Court of Appeals for the Record on Appeal.		
5.4.77	Acknowledgment filed received from the Court of Appeals for the Supplemental Record on Appeal.		
5.9.77	Acknowledgment filed received from the Court of Appeals for the Supplemental Record on Appeal.		

AO 256A

Interval (per Section II) | Start Date / End Date | Ltr. Code

U. S. vs. CHAIM KAHAN

75 CR 762-5 defendant

Day 16 Mo. 10 75 762

No. of Defdnts 7

MISHLER

District 207 Office 01

Misdemeanor ☐

Assigned Trial

Disp./Sentence

MAGR. CASE NO. 7[illegible]

CHARGES

U.S.	OFFENSES	COUNTS
18-659 & 2	Theft of goods in i.c.c.	2

BAIL

☐ Denied

AMT Set (000) $ 25

date

☐ Bail Not Made

☐ Bail Status Changed (See Docket).

ATTORNEYS

U.S. Attorney or Asst: Corcoran

Defense: CJA Ret. Waived Self None Other PD CD

~~Steven Thal~~ Harry Youtt

~~666 Fifth Avenue~~ NYC 10019

~~586-3722~~ 919 3rd Ave NYC

751-3300

INTERVALS DATES

ARREST: 3/4/75 or U.S. Custody Began on Above Charges

☐ High Risk Defn. & Date Design'd

Prosecution Deferred

INDICTMENT ☒ Information ☐ 10-16-75

Waived ☐

Superseding ☐ Indict/Info ☐

ARRAIGNMENT 10/24/75

1st Plea "

Final Plea

Trial Set For 12/1/75

☒ Not Guilty

Nolo

Guilty

Not Guilty

Nolo

Guilty

TRIAL

Voir Dire ☐ 1/17/77

Trial Began ☐ "

Trial Ended 1/25/77

Disposition

Convicted

Acquitted

Dismissed:

Nolled/Discontinued

SENT 3/18/

		DATE	INITIAL/No.	INITIAL APPEARANCE		INITIAL/No.
Search Warrant	Issued			PRELIMINARY EXAMINATION OR REMOVAL HEARING	Date Scheduled	
	Return				Date Held	
Summons	Issued			Waived		
	Served			Not Waived	☐ Intervening Indictment	
Arrest Warrant						
COMPLAINT		3/4/75	75076	Tape No.		INITIAL/No.
OFFENSE (In Complaint)		Theft of goods in i.c.c.				

OUTCOME

✓ Dismissed 75

Held for District GJ

COND

Held to Answer to U. S. District Court

AT:

Magistrate's Initials

Show last names and suffix numbers of other defendants on same indictment/information

GOMEZ 1 ; DIAMOND 2; SANTA 3 ; MALONEY 4; S.WERCBERGER 6; MOR WERCBERGER 7

DATE	PROCEEDINGS	V. Excludable (a)	(b)
10-16-75	Before Neaher, J - Indictment filed - ordered sealed by the Court.		
10-21-75	Before Mishler, Ch J - Indictment ordered unsealed by the Court on consent of AUSA Corcoran.		
10/24/75	Before MISHLER,CH.J.- Case called- deft and counsel present- deft arraigned and enters a plea of not guilty-deft to be released upon execution of $25,000.00 P.R. bond-bail limits extended to include Conn. and N.J.- trial scheduled for 12/1/75.		
11/5/75	Letter from Harry Youtt dated 11/4/75 filed		
11/5/75	Letter from Judge Mishler, dated 11/5/75 that time for pretrial discovery is extended to 11/21/75		
11-18-75	Notice of Motion filed, ret. Nov. 21, 1975 , for dismissal , right to speedy trial, Bill of Particulars, suppressing evidence, severance of Defts Kahan, Solomon and Mor Wercberger, from the trial of the other defts., and Memorandum of Law in support of motion, etc. filed.		
11-18-75	Notice of Readiness for Trial filed		
11-21-75	Govts affidavit~~xxx~~in opposion to defts motion to dismiss,etc. filed.(received from Chambers)		
11-21-75	Before Mishler, Ch J - motion to dismiss - motion argued and motion denied (see back of motion papers.)Motion by deft SANTA for Bill of Particulars		

[illegible] DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
	granted and denied in part as indicated on the record. Case called Pre Trial conference held and concluded - hearing concluded - case reset for trial on 2-23-76.				
2-2-76	75 M 1846 inserted in CR file				
2-23-76	Before MISHLER, CH J - case called - adjd to Mar. 29, 1976 for trial on consent.				
3-2-76	Notice of Motion filed, ret. Mar. 19, 1976, for suppressing evidence, etc.				
3/17//76	Copy of letter from Steven Thal dated 3/15/76 filed				
3-19-76	Before Mishler, Ch J - case called motion to suppress submitted - decision reserved.				
3-29-76	Before MISHLER, CH J - case called - adjd to 5-24-76 for trial on consent				
3-29-76	Certificate of Engagement and Memorandum to all counsel filed setting trial date to May 24, 1976				
5/24/76	Before MISHLER,CH.J.- Case called- adj without date for trial				
6-8-76	Letter filed received from Chambers from counsel for the deft re adjournment of trial date.				
7-8-76	By MISHLER, CH. J. - Memorandum of Decision and Order dtd 7-6-76 denyingmotion to suppress filed.				
12-3-76	Before Mishler, J.- Case Called. 1-17-77 for Trial.		12-3-76	E	
12-13-76	Letter filed from counsel Harry Youtt, Esq. and copy of letter to AUSA Corcoran attached thereto(recvd from Chambers)		1-17-77		
1-17-77	Before Mishler, Ch J - case called - deft & counsel present - Trial ordered and begun - Jurors selected and sworn -Trial contd to 1-18-77.				
1-18-77	Before Mishler, J.- Case Called. Deft. & Counsel present. Hearing held on a motion to suppress. Hearing concluded. Motion to suppress denied as indicated on the record. Trial continued to 1-19-77 at 10:00 A.M.				
1/19/77	Before MISHLER, CH. J. - Case called. Deft & Counsel present. Trial resumed. Trial continued to 1/20/77 at 10:00 a.m.				
1.20.77	Before Mishler, J.- Case Called. Deft. present with Counsel. Trial resumed. Govt. rests. Motion of deft. for a judgment of acquittal is denied. Trial continued to 1-24-77 at 10:00 A.M.				
1-24-77	Before MISHLER, CH J - case called - deft & counsel present - trial resumed - Both sides rest - deft renews motion for judgment of acquittal - denied - trial contd to 1-25-77				
1-25-77	Stenographers transcript filed dated Jan. 17, 1977				
1-25-77	Before Mishler, Ch J - case called - deft & atty present - trial resumed - Marshals sworn - alt. Jurors discharged - at 9:45 am the jury retired for deliberations - at 1:45 PM the Jury returned and rendered a verdict of not guilty on count 1 and guilty on count 2 as to the deft. Jury polled and dischcharged. Trial concluded. All motions reserved to time of sentence - sentence adjd without date. Order of sustenance signed for Lunch .				
2-3-77	Three transcripts filed (one dated Jan. 18, Jan. 19 and Jan. 20, 1977 respectively)				
		(a) Interval (per Section II)	(b) Start Date End Date	(c) Ltr	(d) Total

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

CHAIM KAHAN

75-762-5
Yr. Docket No.

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELA (a)	(b)	(c)
3/18/77	Before MISHLER, CH.J.- Case called. Deft & Counsel present. Deft sentenced to a term of imprisonment on count 2 for a period of 3 years pursuant to T-18:4205 (b)(2). Court advised deft of his right to appeal. Bail continued pending appeal.			
3/18/77	Judgment & Commitment filed. Certified copies to Marshals.			
3-23-77	Notice of appeal filed. Docket entries and duplicate of Notice mailed to the court of appeals			
4-7-77	Transcript filed dated 11-21-75			
4/8/77	Order filed received from the C of A that the record be filed on or before April 26 1977.			
4-22-77	Stipulation re inclusion of documents for record on appeal filed.			
4/22/77	Record on appeal cert & mailed to C of A.JLJ			
4-25-77	Two transcripts filed dated Jan. 24 and Jan.25,1977 respectively. rs			
4.27.77	Supplemental Record on Appeal Certified and delivered to the Court of Appeals by Kathleen Greenmun.			
5.3.77	Supplemental Record on Appeal Certified and delivered to the Court of Appeals by Kathleen Greenmun.			
5.4.77	Acknowledgment filed received from the Court of Appeals for the Record on Appeal.			
5.4.77	Acknowledgment filed received from the Court of Appeals for the Supplemental Record on Appeal.			
5.9.77	Acknowledgment filed received from the Court of Appeals for the Supplemental Record on Appeal.			
	Interval (per Section II)		Start Date End Date	Ltr. Code

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Docket Number 75 CR 752

- against -

Chief Judge Jacob Mishler
(District Court Judge)

CHAIM KAHAN, SOLOMON WERCBERGER
and MOR WERCBERGER,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that CHAIM KAHAN, SOLOMON and MOR WERCBERGER appeals to the United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ order ☐ other (specify) ________ entered in this action on March 18, 1977 (Date).

THAL & YOUTT
(Counsel for Appellant)

Address
919 Third Avenue
New York, New York 10022

Date March 22, 1977
To: DAVID G. TRAGER, ESQ.
United States Attorney
Eastern District New York

Attn: Paul Corcoran, Esq.
Asst. U.S. Attorney

Phone Number (212) 751-3300

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY) TRANSCRIPT INFORMATION – FORM B

▶ QUESTIONNAIRE

☐ I am ordering a transcript
☒ I am not ordering a transcript
Reason:
☐ Daily copy is available
☒ U.S. Attorney has placed order
☐ Other. Attach explanation

▶ TRANSCRIPT ORDER

▶ DESCRIPTION OF PROCEEDINGS FOR WHICH TRANSCRIPT IS REQUIRED (INCLUDE DATE).

Prepare transcript of.
☒ Pre-trial proceedings — Suppression hearing 3/19/7
☒ Trial
☐ Sentence — Suppression hearing and trial 1/17/77 - 1/24/77
☐ Post-trial proceedings

*not ordered by U.S. Attorney

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ▶ Method of payment ☒ Funds ☐ CJA Form 21

ATTORNEY'S signature

DATE March 22, 1977

▶ COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and forwarded to Court of Appeals.

Date order received	Estimated completion date	Estimated number of pages.

Date ________ Signature ________
(Court Reporter)

COPY FOR DEFENDANT

RJD:PFC:cj
F.#753,598

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-against-

MANUEL V. GOMEZ, STANLEY DIAMOND, VINCENT SANTA, a/k/a Jimmy Santa , FRANK JOSEPH MALONEY, CHAIM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER,

Defendants.

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INDICTMENT

(T. 18, U.S.C., §659 and §2)

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between the 10th day of March, 1975 and the 19th day of March, 1975, both dates being approximate and inclusive, within the Eastern District of New York, the defendants MANUEL V. GOMEZ, STANLEY DIAMOND, VINCENT SANTA, a/k/a"Jimmy Santa", FRANK JOSEPH MALONEY, CHAIM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER did knowingly, wilfully and intentionally combine, conspire, confederate and agree, together with themselves and with others not named herein, to commit an offense against the United States in violation of Title 18, United States Code, Section 659 and Section 2, in that they did knowingly and wilfully conspire to receive and have in their possession, approximately 5,072 cartons of Schick shaving products having a value in excess of One Hundred Dollars ($100.00), which goods were stolen from a tractor trailer while moving as and constituting an interstate shipment of freight from West Haven, Connecticut to Annaheim, California.

In furtherance of the said conspiracy and to effect the objectives thereof, the following overt acts, among others were committed within the Eastern District of New York:

OVERT ACTS

1. On March 10, 1975, the defendant MANUEL V. GOMEZ rented a

1975 Plymouth Furey from National Car Rental Systems, 160-14 Hillside Avenue, Jamaica, New York.

2. On March 13, 1975, the defendants CHAIM KAHAN, SOLOMON WERCBERGER and MORE WERCBERGER received approximately 5,072 cartons of Schick shaving products at their warehouse, known as C.B.S. Warehouse, Inc., 58 50th Street, Brooklyn, New York.

3. On March 14, 1975, the defendants, MANUEL V. GOMEZ, VINCENT SANTA, a/k/a "Jimmy Santa" and STANLEY DIAMOND met at 115-33 Lefferts Boulevard, Queens, New York to discuss the receipt of payment for the said stolen products. (Title 18, United States Code, Section 371).

COUNT TWO

On or about the 13th day of March, 1975, within the Eastern District of New York, the defendents CHAIM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER, did wilfully and unlawfully receive and have in their possession approximately Five Thousand Seventy-two (5,072) cartons of Schick Company products, having a value in excess of One Hundred Dollars ($100.00), which goods had been stolen from a Time-D.C. Trucking Corporation truck bearing California license plate number WY6336, while moving as part of and constituting an interstate shipment of freight from West Haven, Connecticut to Annaheim, California, the defendants knowing the same to have been stolen. (Title 18, United States Code, Section 659).

A TRUE BILL.

FOREMAN

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

Form DJ-195
(Ed. 2-7-63)

No. ____________

UNITED STATES DISTRICT COURT

EASTERN District of NEW YORK

____________ Division

THE UNITED STATES OF AMERICA

vs.

MANUEL GOMEZ, STANLEY DIAMOND,
VINCENT SANTA, a/k/a Jimmy Santo,
FRANK JOSEPH MALONEY, CHAIM KAHAN,
SOLOMON NEUBERGER and [illegible] NEUBERGER,
Defendants.

INDICTMENT

T. 18, U.S.C. 3659 and 32

A true bill,

____
Foreman.

Filed in open court this ________ day

of ____________, A. D. 19____

____
Clerk.

Bail, $____________

____

PAUL F. CORCORAN [illegible]
5963054

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA - against - MANUEL V. GOMEZ, STANLEY DIAMOND, VINCENT SANTA, a/k/a Jimmy Santa, FRANK JOSEPH MALONEY, CHAIM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER, Defendants.	:	75 CR 762 J.M., U.S.D.J. NOTICE OF MOTION

- - - - - - - - - - - - - - - - - -x

SIRS:

PLEASE TAKE NOTICE that, on November 21st, 1975 at 2 o'clock p.m. or as soon thereafter as counsel can be heard before the Honorable Jacob Mishler, upon the annexed affidavit of Harry E. Youtt and memorandum of law, the Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger, by and through their attorneys Thal & Youtt, will move this Court for an order granting the following relief:

1) Pursuant to Rule 4 of the local Plan for Achieving Prompt Disposition of Criminal Cases of this district for implementation of the right to speedy trial under F.R.Crim.P. Rule 50(b), dismissing the Indictment upon the ground that the Government was not prepared to proceed with trial within six months of the arrest of Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger:

2) Pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure, dismissing Count One of the Indictment as against said Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger upon the ground that the Indictment and the facts underlying it fail to charge and establish the offense of conspiracy against said Defendants:

3) Pursuant to Rule 14 of the Federal Rules of Criminal Procedure, granting a severance of the trial of Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger from the trial of other defendants, upon the ground that said Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger would be prejudiced by a joint trial:

4) Pursuant to Rule 41(f) of the Federal Rules of Criminal Procedure, suppressing all evidence seized by agents of the Government from the possession of Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger at the premises of the CBS Warehouse Inc. on March 13, 1975 and on March 14, 1975 upon the grounds that said seizure of evidence is unsupported by probable cause and is the product of unreasonable searches and seizures:

5) Pursuant to Rule 16(a) of the Federal Rules of Criminal Procedure, granting Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger the right to inspect and copy any written or recorded statements or confessions made by them or any of them within the possession, custody or control of the Governement:

6) Pursuant to Rule 16(b) of the Federal Rules of Criminal Procedure, granting Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger the right to inspect and copy any books, papers, documents or tangible objects which are material to the preparation of their defense of this action, and including specifically any documents seized by agents of the Governement from their possession or the possession of CBS Warehouse, Inc.:

7) Pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, directing that the Governement file a bill of particulars in response to the requests of said Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger which are set forth in Exhibit A annexed hereto, upon the ground that such particulars are necessary to obtain facts needed to prepare for trial and to avoid surprise:

and 8) For such other relief as to this Court may seem just and proper;

all for reasons more fully set forth in the annexed affidavit and memorandum of law.

Dated: New York, New York
November 17, 1975

Yours, etc.,

THAL & YOUTT

By__________________________
A member of the firm
Attorneys for Defendants Chaim
Kahan, Solomon Wercberger and
Mor Wercberger
919 Third Avenue
New York, New York 10022
(212) 751-3300

TO: Paul Corcoran, Esq.
Assistant United States Attorney
Eastern District of New York

Salvatore Quagliata, Esq.
118-18 Union Turnpike
Queens, New York

Stephen Murphy, Esq.
125-10 Queens Boulevard
Queens, New York

Thomas O'Brien, Esq.
Two Pennsylvania Plaza
New York, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA - against - MANUEL V. GOMEZ, STANLEY DIAMOND, VINCENT SANTA, a/k/a Jimmy Santa, FRANK JOSEPH MALONEY, CHAIM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER, Defendants.	75 CR 762 J.M., U.S.D.J. REQUEST FOR BILL OF PARTICULARS

Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger hereby request that the Government provide them with a bill of particulars with respect to the following matters:

1. Set forth the dates, places and times which the Government contends that the Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger or some or any of them met, spoke or communicated in any way with anyone for the purpose of conspiring as alleged in Count One of the Indictment or to discuss the said conspiracy or its ends and/or to further the ends of the alleged conspiracy.

2. With respect to each such occasion which is the subject of Request No 1., identify with whom it is alleged that the Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger or some or any of them, met, spoke or communicated and the nature of each such conversation or communication.

EXHIBIT A

3. Set forth all acts, other than those set forth in response to Requests No. 1 and 2, which the Government will contend that the Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger or some or any of them performed in furtherance of the alleged conspiracy.

4. Set forth any and all alleged declarations, assertions or statements made by or attributable to any alleged co-conspirators in the conspiracy alleged in Count One of the Indictment which the Government will seek to introduce which ~~indicates~~ that Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger or some or any of them participated in the alleged conspiracy.

5. With respect to each declaration, assertion or statement set forth in response to Request No. 4, identify by names and current residence addresses, the declarant, time and place the alleged statement or declaration was made, the identities, residence addresses of others present at the time each such statement was allegedly made, and the identity and residence addresses of the witness or witnesses who will testify as to the making of each such statement or declaration.

6. Identify and describe all overt acts which the Government claims took place as part of the conspiracy alleged in Count One of the Indictment, including in said description with respect to each, where available, the dates, and locations of each, and the identities of the conspirators and/or others allegedly involved.

7. Identify and describe in the manner requested in Request No. 6, above, all meetings not previously identified in response to Requests No. 1, 2 or 6, of any, some, or all conspirators and/or others which the Government claims took place in furtherance of or for purposes of discussing the conspiracy alleged in Count One of the Indictment.

Yours, etc.,

THAL & YOUTT
Attorneys for Defendants Chaim
Kahan, Solomon Wercberger and
Mor Wercberger
919 Third Avenue
New York, New York 10022
(212) 751-3300

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- against -

MANUEL V. GOMEZ, STANLEY DIAMOND,
VINCENT SANTA, a/k/a Jimmy
Santa, FRANK JOSEPH MALONEY,
CHAIM KAHAN, SOLOMON WERCBERGER
and MOR WERCBERGER,

Defendants.

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AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

HARRY E. YOUTT, being duly sworn, deposes and says:

1. I am an attorney at law, admitted to practice in this Court and a member of the law firm of Thal & Youtt, 919 Third Avenue, New York, New York 10022, attorneys for Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger. As such, I am generally familiar with the facts involved in this case underlying the instant motion, and I make this affidavit upon my best information. Although this Court requested Defendants to obtain informal discovery and disclosure from the Government in order to narrow the issues presented on this motion and to possibly eliminate the need for various items requested in this motion, and although the Assistant United States Attorney assigned to this case indicated his willingness to co-operate in such

a venture, we have been repeatedly unsuccessful, after numerous telephone contacts and personal appearances at the offices of the Assistant United States Attorney, to effect any communication and/or informal discovery or disclosure whatsoever.

2. I submit this affidavit in support of said Defendants' motion to dismiss the Indictment for failure to comply with speedy trial rules, to dismiss Count One of the Indictment for failure to establish the crime of conspiracy, to order separate trials from the trial of other named defendants, to suppress evidence, to inspect statements and documents and to obtain a bill of particulars. With respect to the portion of this motion which seeks the suppression of evidence, Defendants are prepared to present additional testimonial evidence at such time as this Court may set for hearing, either on the return day of this motion, on the eve of trial, or at any other time.

FACTUAL BACKGROUND

3. The Defendants, Chaim Kahan, Solomon Wercberger and Mor Wercberger are co-owners of an entity known as CBS Warehouse, Inc. On or about March 13, 1975, they received a quantity of razor blades in numerous packed cartons. Soon thereafter, federal agents entered their premises armed with a search warrant authorizing the search and seizure of cartons of razor blades. In compliance with

the search warrant, said Defendants readily identified and located the razor blade shipment which they had recently received.

4. Thereafter, federal agents detained these Defendants for a period in excess of one hour, during which they continued a further search of the warehouse premises, including the warehouse office, and during which informal interrogations of each of said Defendants took place.

5. At the end of this detention, defendants were placed under arrest. At this time they were first advised of their constitutional rights to counsel and to silence. They were then taken into custody, where they remained overnight until their arraignment at approximately 2:00 p.m. the next day. At that time they were each released on $10,000 personal recognizance bonds.

6. At or about the time of their release, the agents of the Government obtained a subpoena, copy of which is attached hereto as Exhibit 1, which purported to command the production of

> "any and all books and records relating
> to the storage of goods or freight at
> the premises known as CBS Warehouse, Inc.,
> 58 50th Street, Brooklyn, New York, from
> January 1, 1973 up to and including
> March 14, 1975."

7. Armed with the subpoena, Federal Bureau of Investigation agents insisted that upon their release, Defendants accompany the agents to the CBS Warehouse immediately for purposes of complying with the subpoena, and Defendants, over their objections, complied with these demands.

8. Thereafter, on March 14, 1975, said agents proceeded to again search the premises of the CBS Warehouse, Inc., and gather virtually all of the books and records used by CBS Warehouse, Inc. in the conduct of its business. Said records were removed from the CBS Warehouse, Inc., and were not returned to Defendants for a period of several weeks. During that period, Defendants were virtually paralyzed in their business activities, and their business affairs suffered accordingly.

BASIS FOR MOTION TO DISMISS UPON SPEEDY TRIAL GROUNDS

9. The foregoing events were the sum total of the Government's haste in this matter and thereafter the case against Defendants slowed to a virtual standstill. No Indictment was filed until October 16, 1975, which was seven months and three days after the arrest.

10. The intervening events are illustrative of the inaction and disinterest of the Government in the matter. On April 8, 1975, Defendants appeared before Magistrate Catoggio for a preliminary hearing which was adjourned to April 22, 1975 at the request of the Government attorney, Mr. Corcoran. On April 22, 1975, Mr. Corcoran spoke with Defendants' counsel and advised them that due to the unavailability of the Federal Bureau of Investigation's agent, the preliminary hearing should be adjourned to April 30, 1975.

On April 30, 1975, Defendants appeared before Magistrate Schiffman but Mr. Corcoran did not appear. After some time the Magistrate instructed his secretary to call the United States Attorney's Office and to tell them to send someone down or he would dismiss the case. After another twenty minutes, Assistant United States Attorney Alvin A. Schall arrived and asked Defendants' attorney (Mr. Thal) whether he would consent to a further adjournment because Mr. Corcoran was "tied up on another matter". Defendants' attorney advised Mr. Schall that the preliminary hearing had been adjourned for three weeks, that no Indictment had been handed down and therefore he wanted a hearing without further delay. Mr. Schall advised Magistrate Schiffman of Mr. Corcoran's unabailability and his own total unfamiliarity with the case and requested a further unspecified adjournment. Magistrate Schiffman, upon Defendants' motion, dismissed the case.

11. Defendants' counsel was desirous of disposing of the matter because six weeks had transpired since the arrest and Defendants feared further unfavorable publicity, such as had occurred after the arrests (See Exhibit 2 attached to the Affidavit), because of the difficult business problems caused to Defendants by the open arrest, including the cancellation of bank credits, and in order to remove travel limitations, which deprived them at least partially of their liberty.

12. After the dismissal, Defendants discontinued any significant efforts to prepare a defense. However, on July 24, 1975, I wrote to Assistant United States Attorney Corcoran (Exhibit 3 to the Affidavit) to inquire into the status of the matter and offered to present evidence to any grand jury which might hear the case. That letter again emphasized the desire of Defendants to dispose of the matter "at the earliest possible time." No response to my letter was received.

13. On September 1, 1975, I called Assistant United States Attorney Corcoran about the matter and was told that the case was still under investigation, that no completion date could be given, that the "six month" rule did not apply because of the dismissal. Further, all of my offers of evidence were rejected.

14. September 13, 1975 was the end of the six months period which began with the arrest.

15. On October 16, the indictment was filed, which was seven months and three days from the date of arrest. On October 24, 1975, Defendants were arraigned (seven months and eleven days after arrest). Defendants were again released on their own recognizance except that now their bond was set at $25,000 each and they were required to turn in their passports.

16. Since the arraignment on October 24, 1975, where Assistant United States Attorney Corcoran agreed to supply Defendants immediately with informal discovery, no

documents or materials of any kind have been supplied, despite numerous requests for these items. The unnecessary delays which preceded this Indictment appear to be continuing and are but further examples of the approach taken by the Government towards this case. No notice of readiness was ever filed by the Government, although the Court has set a trial date of December 1, 1975.

BASIS FOR MOTION TO DISMISS COUNT ONE OF THE INDICTMENT AND TO GRANT THESE DEFENDANTS A SEPARATE TRIAL FROM THAT OF OTHER NAMED DEFENDANTS

17. In addition to Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger, the Indictment also names Manuel V. Gomez, Stanley Diamond, Vincent Santa and Frank Joseph Maloney as defendants. Count One alleges a conspiracy among all named defendants. Count Two alleges against Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger only, the substantive crime of receipt and possession of stolen goods and violations of 18 U.S.C. §659. Since the allegedly stolen goods were seized by the Government from the possession of Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger on March 13, 1975, it can only be concluded that the Government will contend that the other named defendants conspired to possess the allegedly stolen goods at a time earlier than the possession by Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger.

18. The only overt act charged in the Indictment against Chaim Kahan, Solomon Wercberger and Mor Wercberger is the act of receipt of the goods on March 13, 1975. Other overt acts charged against other defendants include the renting of an automobile on March 10, 1975 and a meeting on March 14, 1975 to discuss receipt of payment for the stolen goods.

19. Although Defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger have not been accorded the benefit of informal pre-trial discovery it is anticipated that said Defendants' role in the alleged conspiracy is their receipt of the goods on March 13, 1975 from others, and nothing more. If such be the case, Defendants contend that the Government will fall far short in establishing proof of the role of these Defendants in a conspiracy as is more fully discussed in the memorandum of law. Said receipt, instead, merely would constitute evidence that these Defendants may have committed the substantive crime charged in Count Two.

20. These Defendants contend that if the Government's proof against them in support of Count One is no more than this, then it would be unduly prejudicial for these Defendants to be tried with the other named defendants in the case. The conspiracy phase of the case would permit the introduction of what would otherwise be hearsay testimony concerning statements of co-conspirators which would only be admissible

against these Defendants if the conspiracy charge proves to be sufficient to go to the jury. The Defendants contend that upon such proof, the conspiracy charge against them must ultimately be dismissed. Since corrective instructions to the jury to disregard evidence which would be admissible in any other than a conspiracy setting would be difficult if not impossible to follow, these Defendants request that this Court require the Government to make a prima facie showing of its evidence implicating these Defendants in the alleged conspiracy prior to trial. Should it be demonstrated that said evidence is apparently insufficient, these Defendants request that this Court order Count One dismissed as against them and a severance from the trial of the other alleged conspirators, in order to prevent the prejudicial impact of conspiracy evidence against them.

BASIS FOR MOTION TO SUPPRESS EVIDENCE SEIZED ON MARCH 13, 1975

A. The Warrant

21. On March 13, 1975, agents of the Federal Bureau of Investigation first appeared at the CBS Warehouse, Inc. with a search warrant to search and seize certain razor blade products. Because Defendants have not been extended the benefit of informal discovery, they have no way of knowing the purported probable cause basis for the

issuance of the search warrant. They accordingly seek a hearing in advance of trial, pursuant to F.R.Crim.P. Rule 41(f) in which the issue of whether the procedural and probable cause requirements for the warrant were in fact satisfied.

B. Seizure of the Documents on March 13, 1975

22. When the agents presented this warrant to Defendants and/or their employees, they were immediately shown the cartons of razor blades in question. Thereafter, rather than arrest the Defendants at that time, the agents continued a more far-reaching search which was totally unauthorized by the search warrant and would not qualify as a search incident to arrest. During the period, these Defendants were detained in their offices. They were separately questioned by agents. They were ordered to produce shipping documents received in connection with the receipt of the goods which were the subject of the search warrant and in response to such an order, shipping documents were in fact produced.

23. All of the above took place prior to the time Defendants were formally placed under arrest and prior to the first time they were advised of their 5th Amendment rights to silence and their 6th Amendment rights to counsel.

24. Accordingly, as is more fully discussed in the annexed memorandum, Defendants contend that the seizure of the shipping documents and/or any other documents which

may have been seized on March 13, 1975, was the product of unlawful testimonial compulsion and unduly far-reaching and unjustified search which could not have been justified as incidental to an arrest and which was therefore unreasonable. Defendants therefore seek the suppression of all such evidence.

BASIS FOR MOTION TO SUPPRESS EVIDENCE SEIZED ON MARCH 14, 1975

25. When Defendants were arrested, they were told to dismiss their employees and advise them that they should not come to work the following day. When they left the premises of the CBS Warehouse, Defendants locked the doors and indeed the warehouse did not open the following day. Defendants remained continuously in custody until approximately 2.30 p.m. the following day when they were released following their initial arraignment.

26. Under these circumstances, and in view of the time which passed, there was ample time for the agents of the Federal Bureau of Investigation to obtain a search warrant. However, they failed to do so, electing instead to simply procure a subpoena commanding the production of all of Defendants' business records and files.

27. As is more fully discussed in the annexed memorandum of law, Defendants contend that the search which took place the following day, March 14, 1975, in purported

execution of the subpoena, constituted an unreasonable search and seizure in an obvious attempt to violate the requirements of the 4th Amendment and Rule 41 of the Federal Rules of Criminal Procedure which mandate the warrant procedure. This is especially true in light of the fact that Defendants had been arrested the day before and the investigation had clearly come to focus upon them as criminal suspects. Moreover, in light of the breadth of the search and in light of the fact that virtually all of Defendants' business documents were seized and retained by the Govennment, despite repeated requests for their return, Defendants contend that this constituted an unduly broad and general search which would be unjustified even if the subpoena procedure had been proper or if such a seizure had taken place in accordance with a search warrant.

BASIS FOR MOTION FOR DISCOVERY OF STATEMENTS AND DOCUMENTS

28. Oral and possibly written statements were made by the Defendants at various times. Up to the present, copies of such statements or summaries thereof have not been made available to these Defendants. They accordingly request that this Court order the production of such statements at this time.

29. Also, as has been discussed above, Defendants anticipate, at least with respect to documents obtained from the premises of CBS Warehouse, that certain documents or papers will be offered in evidence against them.

Accordingly, pursuant to Rule 16(b) of the Federal Rules of Criminal Procedure, they request production of these documents at this time.

BASIS FOR MOTION FOR BILL OF PARTICULARS

30. Count One of the Indicment charges a conspiracy, alleging three overt acts, in only one of which these Defendants are alleged to have participated. In order for these Defendants to properly prepare for trial and in order for this Court to assess whether or not the Government's case against these Defendants is sufficient to warrant denial of these Defendants' motions for separate trial and dismissal of Count One at this time, further detail as to the nature and extent of their alleged participation in the conspiracy is necessary. Since the Indictment does not spell out such detail, these Defendants contend that they should be entitled to a response to the request for particulars set forth in Exhibit A to the notice of motion.

HARRY E. YOUTT

Sworn to before me this
day of November, 1975

Notary Public

AO Form No. 110 (Rev. 5-68) Subpoena to Testify Before Grand Jury

United States District Court

RJD:PFC:cj

FOR THE

EASTERN DISTRICT OF NEW YORK

To
ANY OFFICER OR DULY AUTHORIZED
REPRESENTATIVE
CBS WAREHOUSE, INC.
58 50th Street
Brooklyn, New York

You are hereby commanded to appear in the United States District Court for the Eastern District of New York at 225 Cadman Plaza East in the city of Brooklyn, N.Y. on the / FORTHWITH XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX to testify before the Grand Jury and bring with you[1] any and all books and records relating to the storage of goods or freight at the premises known as CBS WAREHOUSE, INC., 58 50th Street, Brooklyn, New York from January 1, 1973 up to and including March 14, 1975.

This subpoena is issued on application of the United States.

Clerk.

Date March 14, 19 75

By Deputy Clerk.

By: Paul F. Corcoran, AUSA

[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN

Received this subpoena at on
and on at I served it on the
within named
by delivering a copy to and tendering[2] to the fee for one day's attendance and the mileage
allowed by law.

Date , 19

By

Service Fees
Travel $
Services
Total $

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[2] Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825, or on behalf of a defendant who is financially unable to pay such costs (Rule 17(b), Federal Rules Criminal Procedure).

NOTE: UPON RECEIPT OF THIS SUBPOENA, PLEASE CONTACT ASSISTANT U.S. ATTORNEY PAUL F. CORCORAN, AT 596-3987.

EXHIBIT 1

NEW YORK POST, FRIDAY, MARCH 14, 1975 14

Razor Blade Hijacking: 3 Seized

FBI agents arrested three Brooklyn men yesterday and recovered a $250,000 shipment of razor blades and shaving lather hijacked Tuesday night near Parsippany, N. J., a spokesman said.

The merchandise was being trucked from a Schick Razor Co. plant in West Haven, Conn., to another at Anheim, Cal., when it was intercepted by three armed hijackers on Route 287.

The driver was "brutally beaten" by one hijacker, who pistol-whipped him in the face, the FBI said. The driver was forced into a car along with his helper. Both were released several [illegible] on Staten Island.

Part of the stolen [illegible]dise was recovered in a [illegible] on the CBS Corp. warehouse at 50th St. and First Av. in Brooklyn, a spokesman said. The CBS Corp. has no connection with Columbia Broadcasting System.

Those arrested in the raid were the company's president, Chaim Kahan, 25, of 234 Hughes St., Solomon Wercberger, 24, of 127 Penn St., and his brother, Mor, 27, treasurer, of 5100 15th Av. They were charged with possession of stolen merchandise.

The FBI said the remainder of the stolen shipment was found in a second raid on a warehouse in the Brookly Navy Yard.

9

FBI nabs 3 in truck hijack

United Press International

Three Brooklyn men were arrested yesterday and charged in connection with a truck hijacked on a New Jersey highway earlier this week which carried shaving products valued at $250,000.

John F. Malone, assistant director of the FBI in New York, said the suspects were arrested in two coordinated raids carried out yesterday by city police and federal agents in Brooklyn at the CBS Warehouse Corp., 50th St. and First Ave. and at Building 77 at the old Brooklyn Navy Yard.

The suspects were identified as Chaim Kahan, 25, of 234 Hughes St., Solomon Wercberger, 24, of 127 Penn St. and Wercberger's 27-year-old brother, Mor, of 5100 15th Ave., all of Brooklyn. The suspects were identified as officers of the Warehouse Corporation, which officials said has no connection with the CBS Broadcasting Corp.

Malone said the suspects were arrested at about 4:30 p.m. and charged with theft of an interstate shipment of shaving products owned by the Shick Razor Co. Tues.

According to federal authorities, a tractor trailer en route from a Shick factory in West Haven, Conn., to Anaheim, Calif., was forced off Route 287 in Parsippany, N.J., late Tuesday night by a car containing four men.

The unidentified truck driver, who was severely pistol whipped, and his helper were forced out of their truck and into the car.

The truck was driven away and the two victims were driven to Seaside Blvd., South Beach, where they were released "several hours later," the FBI said.

The truck, operated by the ID.C. Transportation Co., was recovered near E. 99th Street and Second Ave. in Manhattan. The trailer has not been found.

EXHIBIT 2

July 24, 1975

Paul F. Corcoran, Esq.
Assistant United States Attorney
United States Attorney's Office
225 Cadman Plaza
Brooklyn, New York 10201.

Re: United States v. Chai Kahan, Solomon Wercberger, Mor Wercberger

Dear Mr. Corcoran:

You have indicated to me that the investigation of the above matter has not been completed. My clients strenuously maintain their innocence in the matter and of course desire that it be disposed of at the earliest possible time.

It occurs to me that in making the determination with respect to whether to proceed further against these defendants you and/or the grand jury will be faced with the task of evaluating the standards of conduct applicable to warehousemen for the purpose of determining whether probable cause exists to believe that stolen goods have been knowingly received in the course of warehouse business. Given the nature of the business and the nature of the standards of care and performance imposedupon this business by the terms and provisions of the Uniform Commercial Code, the Uniform Warehouse Receipts Act, and its accompanying regulations, I submit that such a determination is at best a complex task. I call your attention especially to the provisions of U.C.C. §7-404 (respecting the standards of civil liability for unknowingly bailing stolen goods:

EXHIBIT 3

> "A bailee who in good faith, including observance of reasonable commercial standards has received goods and delivered or otherwise disposed of them according to the terms of the document of title of pursuant to this Article is not liabile therefor. This rule applies even though the person from whom he received the goods had no authority to procure the document or to dispose of the goods and even though the person to whom he delivered the goods had no authority to receive them."

Similarly, the Official Comment provides:

> "The generalized test of good faith and observance of reasonable commercial standards is substituted for the attempts to particularize what constitutes good faith in the cited sections of the old uniform acts. (Section 10, Uniform Warehouse Receipts Act; Section 13, Uniform Bills of Lading Act). The Section states explicitly what is perhaps an implication from the old acts that the common law rule of "innocent conversion" by unauthorized "intermeddling" with another's property is inapplicable to the operations of commercial carriers and warehousemen, who in good faith and with reasonable observance of commercial standards perform obligations which they have assumed and which generally they are under a legal compulsion to assume..." (emphasis added)

Certainly, if this language sets the standard for civil liability, the standard for criminal responsibility should be no less.

In light of the above, I would therefore respectfully suggest that before completing your investigation, you interview a cross-section of area warehousemen in order to ascertain what are the applicable reasonable commercial standards which a warehouseman should in good faith observe in inquiring into the title of a prospective bailor. Then, in the event the conduct of my clients in bailing the goods in question can be seen to fall within those standards, I would respectfully suggest that the case against them should not be renewed. A very recent case disposing of issues quite similar to those discussed here, appeared in the Law Journal yesterday - People v. Walter, N.Y.L.J., 7/23/75 p. 12 (Kings County Supreme Court).

In the event you determine that the case should be presented to the grand jury, I would suggest that in fairness, testimony of warehousemen as to reasonable commercial standards applicable to the receipt of goods should accompany any other evidence which you present so that the grand jury can make the same factual assessment of warehousemen's standards, since it obviously bears upon probable cause.

To this end, we, along with our clients, are prepared and indeed request the opportunity to provide you with witnesses, publications, information and whatever other assistance you may need in evaluating the issue of the duties of a warehouseman to inspect and verify title to bailed goods.

In light of the gravity of the offense and in light of the difficult factual issue of criminal intent in this matter, I would urge you to give these suggestions every consideration. Kindly contact us at your convenience concerning any of the above.

Sincerely,

Harry E. Youtt

HEY:hcj

PJC:cj
F. 752.598

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA

-against-

CHAIM KAHAN, SOLOMON WERCBERGER
and MOR WERCBERGER, ET AL.,

Defendants.

- - - - - - - - - - - - - - - - - - - x

AFFIDAVIT IN
OPPOSITION

Docket No. 75 CR 762

STATE OF NEW YORK)
) ss:
COUNTY OF KINGS)

PAUL F. CORCORAN, being duly sworn, deposes and says:

1. Your deponent is an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such. This affidavit is submitted, upon information and belief, in opposition to the motion of defendants CHAIM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER to dismiss the indictment 75 CR 762, insofar as it pertains to them, under Rule 50(b) of the Federal Rules of Criminal Procedure.

2. On March 13, 1975, agents of the Federal Bureau of Investigation executed a federal search warrant at CBS Warehouse, Inc., Building 58, 50th Street, Brooklyn, New York. The resulting search revealed approximately 5,072 cartons of Schick Company shaving products which had been taken at gunpoint from a Time-D.C. Trucking Corporation tractor trailer in Parsippany, New Jersey, two days earlier. The goods, worth approximately Two Hundred Thousand Dollars ($200,00) wholesale, had been moving in interstate commerce from West Haven, Connecticut to Annaheim, California at the time of the theft. The

defendants, CHAIM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER, who admitted being corporate officers of CBS Warehouse, Inc. and operating the warehouse in the corporate name, were arrested and charged with knowingly, wilfully and unlawfully possessing the stolen shaving products.

3. On March 14, 1975, the defendants were arraigned before Magistrate Max Schiffman and, on the Government's application, were released on personal recognicance bonds in the amount of Twenty-Five Thousand Dollars ($25,000) each. A probable cause hearing was scheduled for April 8, 1975 at 2:00 P.M.

4. The probable cause hearing, which was originally shceduled for April 8, 1975, was first adjourned to April 22, 1975, and then to April 30, 1975. Both adjournments were with the consent of defense counsel. Indeed, both adjournments were preceded by discussions between your deponent and defense counsel concerning the culpability of defendants, public warehousemen, for the storage of stolen goods. The two one-week adjournments reflected your deponent's belief, contemporaneously communicated to defense counsel, that upon the evidence then available, one or more of the defendants might have been innocently in possession of the stolen goods. Further investigation, rather than precipitant indictment, appeared to be in the best interest of justice.

5. On April 30, 1975, the adjournment date of the probable cause hearing, your deponent was actually engaged in the trial of United States v. Nachajski (75 CR 191) before the Honorable Jack B. Weinstein. Being thus unable to attend the

scheduled hearing in United States v. Kahan, et al., and having developed no further evidence at that point which in your deponent's opinion would justify indictment of the defendants, your deponent enlisted the services of Assistant United States Attorney Alvin A. Schall to appear at the hearing for the purpose of obtaining an additional adjournment, or alternatively, to move for dismissal of the complaint. Upon Assistant United States Attorney Shall's motion for an adjournment, Magistrate Schiffman dismissed the complaint. The Government did not object to the dismissal of the complaint.

6. On April 30, 1975, your deponent closed the Government's file in the case of United States v. Kahan, et al. (File No. 751,410). The closing of the file was, again, based upon your deponent's belief that the evidence then existant, was insufficient to sustain a conviction for knowingly possessing stolen property.

7. Upon inquiry from defense counsel, in July, and again in September of 1975, your deponent made clear that the complaint against the defendants CHAIM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER had been dismissed, and that, insofar as their clients were concerned, nothing remained outstanding. In response to probing questions as to the finality of the closure, your deponent stated that the Federal Bureau of Investigation investigation into the theft was continuing, and that any developments affecting Messrs.Thal's and Youte's clients would be brought to their attention.

8. In early October 1975, testimony clearly implicating the defendants CHAIM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER in the unlawful possession of the stolen Schick products became, for the first time, available. A witness who had previously supplied information to Government agents from an informant capacity, terminated his undercover status and indicated a willingness to testify as to the criminal matters within his personal knowledge. One matter with which this witness was familiar was the theft of the Schick products here in question. Upon learning of the existence and availability of this witness, your deponent immediately arranged an interview. It was only after this interview, on or about October 3, 1975, that your deponent had available evidence that the defendants' March 13, 1975 possession of the stolen Schick products was not an innocent storage by public warehousemen, but rather that the defendants had in fact purchased the stolen goods from their co-defendants MANUEL GOMEZ, STANLEY DIAMOND, VINCENT SANTA, a/k/a "Jimmy Santa" and FRANK MALONEY. That evidence was expeditiously presented to a federal grand jury which voted the instant indictment on October 16, 1975.

9. Counsel for defendants CHAIM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER were notified of the indictment and arrangements were made for appearances for arraignment without arrest. Thereafter, arraignment was held before this Court on October 24, 1975. Defendants CHAIM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER were again released on Twenty-Five Thousand Dollars ($25,000) personal recognizance bonds. Since one co-defendant, MANUEL GOMEZ, was incarcerated, the matter was treated as a jail-case calling for the trial within ninty (90) days. (Rule 3(a)(1) of the Second Circuit's Interim Plan Pursuant to the Speedy Trial Act of 1974, P.L. 93-619).

Accordingly, trial date was set for December 1, 1975.

10. On October 28, 1975, the defendant MANUEL GOMEZ met bail requirements and was released from custody. The case is therefore no longer subject to the ninty (90) day trial rule under Rule 3(a)(1) of the Interim Plan.

11. A total of seven weeks expired between the arrests of defendants CHAIM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER on March 13, 1975 and the dismissal of the complaint on April 30, 1975. Thereafter the running of the six-month rule (Rule 4 of the Eastern District Plan for Prompt Disposition of Criminal Cases) was tolled. United States v. Flores, 501 F.2d 1356 (2d Cir. 1974). It did not begin to run again until the indictment on October 16, 1975. That an investigation continued in the interim is of no legal significance. As the Second Circuit stated in Flores, "[d]uring the period [defendants were] not subject to any of the disabilities associated with being under arrest, the subject of a complaint or indictment, or in the midst of a criminal prosecution. [They were] under no more jeopardy than any other citizen, and the fact that [they] might have been under investigation has no more effect after the dimissal on the running of the six-month period than if would have had before [this] arrest, that is, none." 501 F.2d at 1359-1360. Since indictment four weeks have elapsed. With respect to defendants CHAIM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER, then, the sum total of time elapsed under Rule 4 is eleven weeks. This is within the 24 weeks permitted the Government under the Eastern District Plan.

12. Your deponent's failure to meet with defense counsel for the informal discovery during the three weeks prior to the

submission of the motion papers was by no means deliberate. Rather, such a meeting was, under the circumstances, a practic impossibility. Defendants were arraigned on October 24, 1975. At that time your deponent was preparing a brief for the Court of Appeals, (United States v. Rodriguez, 75-1287, filed November 2, 1975), as well as the trials of United States v. Seiden, 75 CR 147 and United States v. Daniels and Holmes, 75 CR 96. The Seiden trial commenced before the Honorable Mark A. Costantino on November 5, 1975 and ended November 17, 1975. The trial of Daniels and Holmes is scheduled to begin Monday, November 24, 1975. The defendants motion papers were filed on the evening of November 17, 1975 and were received by your deponent on November 18, 1975.

13. While your deponent had been previously unable to meet with defense counsels, he is presently prepared to make available to them all appropriate discovery materials.

WHEREFORE, your deponent respectfully requests that the motion of defendants CHAIM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER to dismiss the indictment pursuant to Rule 4 of the Eastern District Plan be in all respects denied.

Paul F. Corcoran
PAUL F. CORCORAN
Assistant U.S. Attorney

Sworn to before me this
21st day of November, 1975.

Juanita Mayo
JUANITA MAYO
Notary Public, State of New York
No. 24-4501911
Qualified in Kings County
Commission Expires March 30, 1977

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse 225 Cadman Plaza East, Brooklyn, New York on the ____ day of ______________, 19____ at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
___________________________, 19____

____
United States Attorney,
Attorney for ___________________
To:
____
____
____
Attorney for ___________________

SIR:

PLEASE TAKE NOTICE that the within is a true copy of ____________ duly entered on the ____ day of ________________
______________, in the office of the Clerk of the U. S. District Court for the Eastern District of New York
Dated: Brooklyn, New York,
___________________________, 19____

____
United States Attorney,
Attorney for ___________________
To:
____
____
____
Attorney for ___________________

CRIMINAL Action No. 75 CR 762

UNITED STATES DISTRICT COURT
Eastern District of New York

UNITED STATES OF AMERICA

—Against—

CHAIM KAHAN, SOLOMON WERCBERGER
and MOR WERCBERGER,

Defendants.

AFFIDAVIT IN OPPOSITION

DAVID G. TRAGER
United States Attorney, EDNY
Attorney for U.S.A.
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within ______________ is hereby admitted.
Dated: ______________________, 19____

____
Attorney for ___________________

PAUL F. CORCORAN, AUSA
596-3954

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--x

UNITED STATES OF AMERICA, :

-against- :

MANUEL V. GOMEZ, STANLEY DIAMOND, : 75-CR-762
VINCENT SANTA, FRANK JOSEPH MALONEY,
CHIAM KAHAN, SOLOMON WERCBERGER & :
MOR WERCBERGER
:
Defendants.

--x

United States Courthouse
Brooklyn, New York

November 21, 1975
2:00 o'clock P.M.

Before:

HONORABLE JACOB MISHLER, U.S.D.J.

HENRY LEGENDRE
ACTING OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: PAUL CORCORAN, ESQ.
Assistant U.S. Attorney

SALVATORE QUAGLIATA, ESQ.
STEPHEN MURPHY, ESQ.
THOMAS O'BRIEN, ESQ.

Attorneys for the Defendants

THE CLERK: Criminal cause pre-trial hearing U.S.A. versus Manuel V. Gomez, Stanley Diamond, Vincent Santa, Frank Joseph Maloney, Chiam Kahan, Solomon Wercberger and Mor Wercberger.

THE COURT: A copy of the affidavit was served on defendant?

MR. CORCORAN: Mr. Youtt received a copy.

THE COURT: It's been filed, the original has been filed.

MR. CORCORAN: I would like to hand up the original at this time.

THE COURT: I got the copy just before I came on the bench.

Who made the motion?

MR. Youtt: The defendant KAhan, Solomon Wercberger and Mor Sercberger.

THE COURT: How are the others, same ground?

MR. Youtt: There are some common grounds and some grounds unique only to the defendant.

THE COURT: Let's first take the motion to dismiss. Suppose the other lawyers sit down for this purpose. Let's understand, this is on a motion to dismiss for a violation of speedy trial rules.

MR. Youtt: Yes.

THE COURT: Please get me our speedy trial --

have you gone over the affidavit?

MR. YOUTT: I have read it and I am basically familiar with it.

THE COURT: Go over it and tell me whether you dispute any of the statements made in Mr. Corcoran's affidavit.

Now, this is because they failed to indict within --

MR. YOUTT: Within six months of the time of the arrest.

THE COURT: Indict.

MR. YOUTT: Well, failed to file their statement of readiness but they didn't indict within that period; obviously without indicting there would be no need to file a statement of readiness. The fact that the arrest was made on March 13, a number of adjournments of the preliminary hearing transpired.

THE COURT: Go through the affidavit and tell me if you dispute any of the statements in the affidavit. Its claimed under the 50B plan.

MR. YOUTT: On the basis of reading through this affidavit with respect to the facts of which I've acknowledged, I don't dispute anything that is set forth by the Government.

THE COURT: Then, let's take it -- let's start computing time. It's just a matter of mathmatics.

When was he arrested?

MR.YOUTT: March 13, 1975.

THE COURT: This refers all through -- March 13, 1975.

When was the complaint dismissed?

MR.YOUTT: April 30, 1975.

THE COURT: So that's 17 -- that's about 47 days; is that correct?

MR. YOUTT: That's correct, your Honor.

THE COURT: Now, when was he reindicted?

MR. CORCORAN: October 16, 1975.

THE COURT: When did you file your notice of readiness?

MR. CORCORAN: The notice of readiness was filed this Monday, November 17.

THE COURT: You don't think the period from the time of dismissal of the complaint to the time of filing notice of readiness, filing of the indictment is an excludable period?

MR.YOUTT: Under the circumstances of the case that's our position.

THE COURT: All right, motion denied.

MR.YOUTT: I take it your denial is based upon the legal conclusion that no circumstances would be admissible for purposes of the argument of supporting the argument that the proceedings should have been brought to trial within six months of the first arrest. I would be prepared to make an argument with respect to that particular issue.

THE COURT: I'm not interested in the argument. Were I to attempt to fix a specified excludable period under our 50B plan I would pick -- excludable period under 50F. These are exceptional circumstances. The man isn't under indictment, not under restraint. There was no evidence against him. The other possible period would be Cl. Evidence material to the Government's case is unavailable, so you could take it from there on. I had a small hand in drawing these rules. It was never intended to apply for a period where a complaint is dismissed because there is no probable cause to hold him for the Grand Jury, and then when the Government does have a proper cause and has the right to proceed that then because he was arrested some months before, that now the Government is precluded from proceeding.

MR. YOUTT: What would prevent the Government from really doing this every case in order to avoid its obligation under the six months rule?

THE COURT: The fact is, they haven't done it in every case. This is the first instance it's come to my attention in which it's done. It has not become a practice. It's not intended to be a game. This is a case to protect the public interest in a speedy trial and you must underscore that; and the appellate courts are finally using that term.

MR. YOUTT: It's not the defendant's interest also involved in this matter.

THE COURT: No, not at all. The defendant's interest is protected by the eighth amendment not by the plan pursuant to Rule 50B. When our Second Circuit adopted the Second Circuit rules for the prompt disposition of criminal cases it was specifically understood that it was for the protection of the public interest. It's just that the defendant used it, and their interest at times did run along parallel lines with the public, but to say that if a man is arrested and then discharged by the Magistrate, because there was not enough evidence to hold him, to say that that is in the public interest is just to distort the entire concept.

MR. YOUTT: That was not the case. The Government elected not to go forward.

THE COURT: He dismissed it.

MR. YOUTT: He could dismiss it --

THE COURT: Without opposition. You didn't oppose the dismissal. You could take that to the Court of Appeals. I'm ready to rest on what I said on this record. Next.

MR. YOUTT: There are discovery aspects of this motion which we filed because we haven't been able to receive the informal discovery from the Government, which was anticipated at the arraignment. Those aspects of the motion are included among other things. There is also a motion addressed to suppression of evidence which would -- I think require an evidentiary hearing, and I would consent to adjourn that till the commencement of the trial or to any time convenient to the Court.

THE COURT: I've written that denial on that back of the notice of motion.

MR. YOUTT: The next section of the motion is addressed to the issue of the conspiracy count, Count 1 of the indictment. It's our position, your Honor, that the evidence which we anticipate is available, which we don't know is available, or which the Government intends to rely upon, since we haven't heard from them, the evidence is merely evidence of the fact that the defendant that I represent in this case, Chiam Kahan, Solomon Wercberger and Mor Wercberger received these stolen goods, and on the basis of that it is our contention thatthat is not sufficient evidence to support the contention that they were conspirators in the crime; that they entered into a conspiracy to receive the stolen goods. At best it's merely evidence of the actual commission of the substantive count which is Count 2. On the basis of that --

THE COURT: You are saying the indictment is insufficient, or the evidence is insufficient to convict them?

MR. YOUTT: The indictment is insufficient. It merely charges an overt act of them receiving the goods.

THE COURT: That the grounds, insufficiency of the indictment.

MR. YOUTT: Yes.

THE COURT: Motion denied.

MR. YOUTT: Also it is our position with respect to that particular aspect of the case, that the Court should take a look at the Government's evidence when it appears that the only evidence of conspiracy is going to be the evidence of receipt, which has been held to be insufficient upon the grounds that if we get into a jury trial, and if evidence of conspiracy is introduced against all defendants, and if at that point it becomes apparent that the Government's case is not going to be supportable on the conspiracy issue against these defendants whom I represent, it will be too late to cure the record and give them a fair trial.

THE COURT: Is that an additional motion?

MR. YOUTT: Additional motion. It's the basis of our motion for separate trials from the other co-conspirators in this case.

THE COURT: Motion denied. Next.

MR. YOUTT: The next section of the motion, I believe -- I haven't looked at the order of things, it's into the question of motion to suppress evidence, which are indicated may require the taking of testimony in an evidentiary hearing which I would ask for an adjournment until the trial. The remainder of the motion is addressed to discovery matters which I think we could dispose of today.

THE COURT: Was this procedure pursuant to a warrant?

MR. CORCORAN: Yes.

MR. YOUTT: There was another search the following day which was pursuant to a subpoena.

THE COURT: I assume it was a warrant out of our Court.

MR. CORCORAN: Yes sir.

THE COURT: Based on the affidavit of Donald E. Dowd.

For the complaint of Donald E. Dowd sworn to March 14 --

MR.YOUTT: That was the arrest.

MR. CORCORAN: It was a prior search warrant.

THE COURT: What was the date of the search warrant?

MR. CORCORAN: I believe it was the 12th of March.

THE COURT: Twelfth of March. Is there a Stanley Diamond in this case?

MR. CORCORAN: Stanley Diamond.

THE COURT: There was. I have the Magistrate's file.

MR. CORCORAN: The affidavit for a search warrant was sworn to before Magistrate Kotogio (ph) the 13th of March, 1975 by Agent Patrick Colgan.

THE COURT: I can't find it. May I have a copy of it?

MR. CORCORAN: Yes sir.

MR. YOUTT: I don't have a copy of it. I have never seen it, your Honor.

THE COURT: I thought you said it was insufficient as a matter of law.

MR. YOUTT: I have not seen it.

THE COURT: How can you say that without seeing it?

MR. YOUTT: That's not the principal basis of my motion to suppress, but I would like to have the probable cause supporting it before the evidence is introduced; and again, I have no evidence with respect to what was the probable cause supporting that particular search warrant.

THE COURT: So what you want to do, you're contesting the allegations in this affidavit. You are saying that they are not true.

MR. YOUTT: I have not seen the affidavit, your Honor. The basis -- the principal basis of my motion with respect to a seizure of material which was taken incidental to the execution of that particular warrant; and the second --

THE COURT: Do you have the warrant?

MR. YOUTT: And the second basis of my motion is a search which took place the following day pursuant not to that search warrant but to a subpoena which was issued, a Grand Jury subpoena, which was issued and executed on that particular day. There was no search warrant which supported research on the second day.

Now, I don't even know, your Honor, whether anything that was obtained on the second day will be used or lead to evidence which the Government --

THE COURT: Let's take one thing at a time.

MR. CORCORAN: I do not have a copy of the warrant in this file.

THE COURT: Your motion says you are seeking suppress upon the grounds that said seizure of evidence is unsupported by probably cause, and is a product of unreasonable search and seizures.

MR. YOUTT:That's correct, your Honor.

THE COURT: Well, I always thought that if the affidavit or other evidence before the Magistrate at the time of the issuance of the warrant showed a probable cause that that was it.

MR. YOUTT:Your Honor, that's with respect to the evidence that was seized pursuant to the warrant.

(Continued on next page)

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THE COURT: Let me look at the sufficiency of the affidavit with respect to that.

Here is what Patrick F. Colgan says: He received a communication from the Federal Bureau of Investigation from a Mr. James Lester, an employee of Time-D.C. TRucking Corp., of Secaucus, New Jersey, that a trailer owned and operated by Time-D.C. Trucking Corp., and bearing California license plate # WY6336 was hijacked on March 11, 1975. Mr. Lester further advised taking from the trailer 6,910 cartons of Schick razors and products which cartons were being shipped from the Schick, Inc., West Haven, Connecticut to Anaheim, California. A reliable confidential informant, who has previously supplied information to the Federal Bureau of Investigation which information has resulted in the arrest of one individual for the theft of approximately $75,000 worth of stolen merchandise and whose information has also led to the recovery of approximately $25,000 worth of hijack property and the arrest of two individuals in connection with that hijacking has stated, that he was in the above-described premises known as CBS Warehouse on March 12, 1975. While in the above-described warehouse the reliable informant observed several thousand cartons of Schick Super-Two Bonded Razors bearing the Schick, Inc. spec number 02-40 [illegible] the cartons.

Do you think that's sufficient probable cause? That's the warehouse that was searched, right?

MR.YOUTT: That was the warehouse that was searched.

THE COURT: "CBS Warehouse, Inc., a multi-story red brick building known as Building No. 58 located at the foot of 50th Street, Brooklyn, New York" --

I don't require a hearing on that. The motion insofar as it challenges the seizure of evidence based on this affidavit on the grounds that it fails to snow proper cause is denied.

Now, let's go to some other evidence that was seized through a subpoena, Mr. Corcoran.

MR. [illegible]OUTT: Before that, there was a matter of obtaining of certain supporting documents, documents received in connection with this shipment, which the agents who were executing this particular warrant obtained from the defendant on the say of the arrest.

Now, when in terms of a period of time --

THE COURT: Now, wait. You are talking about a third thing. You are talking about a search incidental to the arrest.

MR. YOUTT: That's what probably the Government will content. It's our feeling it took place before the arrest took place.

THE COURT: Do you see that in your papers?

MR. YOUTT: Yes, it's covered.

THE COURT: Where is that?

MR. YOUTT: Paragraph 22 to 24.

THE COURT: 22 to 24; seizure of the documents on March 13. The affidavit for the search warrant is March 13. You say these documents were seized before the search warrant --

MR. YOUTT: After the search warrant was issued, and after the search warrant was executed. I believe the search warrant covers the actual goods themselves.

THE COURT: Now, you say thereafter rather than arrest the defendant at that time, the agents continued a far reaching search and does not qualify the search incident to arrest. How can I tell that without looking at the search warrant? The affidavit says the area to be searched -- is usually repeated in the search warrant -- premises known as CBS Warehouse, a multi-story red brick building located at the foot of 50th Street, Brooklyn, New York; and there the search and seizure --

MR. YOUTT: The property described razor blades not documents.

THE COURT: If they found the shipping documents of the razor blades that was outside the search; is that the argument?

MR. YOUTT:It is in that --

THE COURT: That's the argument.

MR.YOUTT: Yes.

THE COURT: What do you say about that?

MR. CORCORAN: I think I would have to determine what actually went on at the warehouse that day. I believe that these documents relating to the products themselves were feasible, and it's my understanding they were turned over to the FBI -- a point when exculpatory statements were made; the time these documents were produced.

THE COURT: Apparently documents were seized at that time. Do you know about that?

MR. CORCORAN: Documents were seized at that time.

THE COURT: At that time.

MR. CORCORAN: Correct.

THE COURT: Well, if they are in plain view --

MR.YOUTT:It wasn't a question of plain view. They were turned over by the defendants.

THE COURT: Turned over by them?

MR. YOUTT: Where were they, on their person? They were in their offices of the defendant.

THE COURT: Did the agents demand them?

MR. YOUTT: It's my understanding of the facts.

THE COURT: Who told you that?

MR. YOUTT: From interviews of various witnesses, including defendant, I learned a basic outline of the facts, and again this is an issue which I don't expect to be determined on the basis of my understanding of the facts , but rather on the basis of an evidentiary hearing.

THE COURT: Where were they arrested?

MR. YOUTT: At the premises, at CBS premises.

THE COURT: While the search was going on?

MR. YOUTT: After, as I understand it.

THE COURT: The search was all completed. The agents had taken full custody of all the articles seized, then arrested defendants.

MR. YOUTT: As I understand the chronology, agents appeared on the premises, appeared with a search warrant. They were immediately shown the location of the razor blades on the premises. Thereafter they conducted additional interviews and an investigation at that time, at that place; and after the completion of the interviews and after the investigation on the premises they made the arrest of the defendants.

MR. CORCORAN: I believe the arrest was made as Mr. Youtt said, after the goods had been discovered, and after in the course of the investigation documents were produced; documents which themselves were of a suspicious nature which led the agents to believe these particular defendants were in possession of these goods unlawfully.

THE COURT: Were they demanded by the agents?

MR. CORCORAN: I don't believe so. I believe it was a question --

THE COURT: I don't see any fourth amendment problem here; I see a possible fifth amendment problem.

MR. CORCORAN: It's a question of investigatory questioning and exculpatory documents which related to the stolen goods.

THE COURT: Do agree with the sequence of events exactly as it was stated by defense counsel?

MR. CORCORAN: Based upon my understanding of the facts; yes.

THE COURT: Then you are not sure you agree?

MR. CORCORAN: I'm not. Moreover, these particular defendants, as I understand it, were not the only people in that warehouse.

MR. YOUTT: There were employees of the warehouse who were also there who were not defendants.

THE COURT: There are cases which say that search incident to arrest need not follow in particular and definite time sequence, first the arrest and then the search. The case is usually phrased sometime simultaneously with the arrest or nearly so; so there are cases where a search incident to arrest actually preceded the formal arrest.

MR. CORCORAN: I'm not certain at this time that these documents we are discussing were the result of these searches.

THE COURT: That's the claim here, or they were voluntarily given up. I see this as a fifth amendment claim -- whether the FBI agents demanded it, whether it was in effect an in custody --

MR. CORCORAN: The fifth amendment question was a corporation, and corporate papers --

THE COURT: They weren't papers that belonged to this corporation, they were shipping documents, weren't they, from a shipping to whoever they were selling to.

MR. CORCORAN: Documents at CBS Warehouse, Inc. we are discussing for the most part.

THE COURT: Aren't we talking about the shipping documents for this shipment of razor blades?

MR. YOUTT: As I understand --

THE COURT: You say these were fake documents?

MR.CORCORAN: Some of the documents were created at CBS Warehouse, Inc.

THE COURT: They were not the original shipping documents of the Schick Razor Company?

MR. CORCORAN: No.

THE COURT: Is that correct?

MR. YOUTT: I don't know. I've never seen them and I've never had communication with the Government.

THE COURT: That's the best way to decide a motion. I can decide it one way or the other. What evidence did you intend to submit on shipping documents?

MR. CORCORAN: With regard to the seizure of the documents, your Honor?

THE COURT: The only evidence the defendant is objecting to is the evidence that you are going to offer.

MR. CORCORAN: Let me give Mr. Youtt a copy of the documents.

THE COURT: Is that a copy? May I see it?

Is S&F Warehouse the warehouse controlled by defendants?

MR. CORCORAN: No; CBS Warehouse.

THE COURT: The first document's designation is S&F Warehouse. Is this a general document?

MR. CORCORAN: These -- the S&F was obtained from S&F Warehouse. That does not apply.

THE COURT: You don't intend to offer it?

MR. CORCORAN: I may offer it but not seized from Mr. Youtt's clients.

THE COURT: Assigned to International Trading --

MR. CORCORAN: That would be a shipping document that was obtained from CBS Warehouse, Inc.

THE COURT: And this is the document?

MR. CORCORAN: It's not a document from Schick, it's not the original bill of lading.

THE COURT: It's a fake, you say?

MR. CORCORAN: That's right.

THE COURT: Do you intend to offer it?

MR. CORCORAN: Yes, your Honor.

THE COURT: National Car Rental Contract; is that a document seized at the time?

MR. CORCORAN: These are all documents I'm turning over. Only a few relate to Mr. Youtt's instant motion.

THE COURT: The only ones I see that have any relationship to the seizure are the International

Trading Company documents that you may use, and the second document --

MR. CORCORAN: Teresa Corporation documents.

THE COURT: The second is Teresa Merchandise Corporation.

MR. CORCORAN: The following one is CBS Warehouse, Inc. bill of lading; next document another CBS Warehouse, Inc. bill of lading.

THE COURT: All the bills of lading?

MR. CORCORAN: That's correct.

THE COURT: Everything except the two rental car leases.

MR. CORCORAN: That's correct; and the initial document which is S&F.

THE COURT: Mark this as Government Exhibit 1 in this case.

THE CLERK: So marked.

THE COURT: Now, you say all those invoices or shipping documents were seized at or about the time of the arrest?

MR. CORCORAN: That's correct.

THE COURT: You are not sure as to whether the agents demanded the proof of ownership or they were given in response --

MR. CORCORAN: It's my understanding the agents entered the CBS Warehouse with a search warrant for these goods, it having found the goods they began an investigation to determine whethar those goods were lawful or unlawfully in the possession of the people who own CBS Warehouse. In questioning the defendants as to their possession of those goods these documents were produced, full exculpatory statements were made as to how the goods had come into CBS Warehouse, and at that time the documents were seized and the defendants were thereafter arrested.

THE COURT: Mark the car rentals Government Exhibit 2. There are two documents at the end of that. Is that a different category?

MR. CORCORAN: Also with the S&F Warehouse a bill of lading which appears on the front.

THE CLERK: Car rental document marked Government's Exhibit 2.

(So marked.)

THE COURT: I'll hold a hearing in this matter on the admissability of thedocuments marked Government Exhibit 1.

Any other documents that you seek to suppress?

MR. YOUTT: Again I'm not sure, but I'm sure there was a second search; second in terms of day, the day that passed. [illegible]he defendants were in custody, they were released from custody and at that point served with a subpoena, a Grand Jury subpoena duces tecum. And they were accompanied over their protest by FBI agents, back out to the premises of the CBS Warehouse.

THE COURT: Did they give testimony, incidentally, before the Grand Jury?

MR. CORCORAN: Who?

THE COURT: These defendants.

MR. CORCORAN: No, they did not.

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THE COURT: Well, thank God, because if the Government makes a practice to bring potential defendants -- so-called targets into the grand jury, and that grand jury indicts, there is a quesion as to whether the indictment is good. Judge Finlay questioned the indictor, and I could tell you in the case of United States against Hinton I refused to dismiss the indictment on that ground because I couldn't see the reasoning in it, but I would suggest that you avoid it. In that one case, the Hinton case, the facts were complicated by the fact that the Government gave a grant of immunity, so that the defendant had to testify, and then indicted, and that's going up to the Court of Appeals with my prayer.

MR. CORCORAN: These defendants did not appear before the grand jury.

THE COURT: All right, good.

MR. YOUTT: The documents -- I don't know whether the documents did or not, but the documents were obtained pursuant to this particular subpoena. The subpoena authorized the obtaining of all documents relating to --

THE COURT: Don't they know the documents they brought to the grand jury? Haven't they told you that?

MR. YOUTT: Documents brought to the grand jury -- all these were the documents that these defendants used in connection with their business. Those documents remained in the hands of the Government for several weeks until all of them were returned -- substantially all of them were returned. I don't know whether any of those documents or all of those documents are going to be utilized by the Government.

THE COURT: Do you know anything about that?

MR. CORCORAN: A subpoena was issued for any and all books and records relating to the storage of goods, freight, at the premises known as CBS Warehouse, 50th Street, Brooklyn, from the period January 1, 1973 up to and including March 14, 1975, directed to any officer or duly authorized representative of CBS Warehouse, Inc. at that address. Pursuant to this sbupoena, the books and records in question were produced. They were of no evidentiary value and they were returned.

THE COURT: Do you intend to offer any part of it?

MR. CORCORAN: Everything was returned to the defendant. All documents produced were returned.

THE COURT: They were served on the corporation, so they are corporate documents.

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MR. YOUTT: I'm not making a Fifth Amendment claim as to their suppressibility at this point.

THE COURT: I don't have to pass upon it. The Government doesn't intend to use it.

MR. YOUTT: I take it it's the Government's representation that the possession of those documents, or anything obtained therefrom, did not lead to evidence which the Government intends to use in this case; is that correct?

Those documents were of no value whatsoever.

THE COURT: That's what Mr. Corcoran says. I'm not sure that they couldn't use it. Don't interpret my silence as indicating, or Mr. Corcoran's statement as indicating that I think what they did was improper, and that they weren't permitted to use any information they got in the documents. Certainly I'm referring only to those matters that were not of a personal nature, but if they are documents made by CBS Warehouse, I don't see any violation of any constitutional right there.

Anything else?

MR. YOUTT: Yes, your Honor. There remains now the matters of discovery under Rule 16. I would like all of the defendants to participate in this. I'm hoping to avoid three separate bills of

4 particulars and three separate demands for statements and so forth.

THE COURT: Have you gentlemen served different demands on the Government?

MR. MURPHY: I've served a motion for bill of particulars.

THE COURT: And you served a motion for a bill of particulars?

MR. YOUTT: Yes.

THE COURT: Have you, Mr. O'Brien?

MR. O'BRIEN: The Government represented to me the only evidence they have against my clients are handwriting exemplars and questioned documents which they claim are mine. The only thing that I wanted, and the Government had agreed to give me, were copies of the handwriting exemplars which I was supplied with this morning. However, I stll do not have the questioned documents and, of course, without the questioned documents --

THE COURT: Well, Mr. Corcoran is submitting something to you. If that's what you are submitting I would like it marked.

MR. CORCORAN: Yes.

THE COURT: So it's been handed over. All the bills of lading are Exhibit 1 and the rental agreements

5 are 2.

Have you seen each other's demands for a bill of particulars?

MR. MURPHY: I've received copies of his yesterday.

MR. CORCORAN: I received demands of a bill of particulars from Mr. Youtt, and this morning from Mr. Murphy. I have not seen those before. I have not had an opportunity to go through them.

THE COURT: I thought we might coordinate them, and if a different number of bill of particulars ask the same question, answer it once and refer to the numbers, because too often when two or three or five defense lawyers serve different bills of particulars and ask them in different ways, and the Government answers them in different ways, when I come to the trial the claim is by one or the other that they did not answer the question properly and they ask that certain evidence be excluded because the Government attempting to answer one question didn't answer it fully with relation to the other. I in effect want one bill of particulars so that the parties know fully what the claim is without adding confusion to the Government's position.

Can we do that, Mr. Corcoran?

6 MR. CORCORAN: Yes, if your Honor grants their request -- referring to requests for bill of particulars to Mr. Youtt on behalf of defendants Kahan, Solomon Wercberger and Mor Wercberger.

THE COURT: Exhibit?

MR. YOUTT: Exhibit that follows the notice of motion that I filed. Before my affidavit -- after the notice of motion.

THE COURT: Oh, I see.

MR. CORCORAN: The Government would oppose each and every paragraph calling for evidence the Government will produce at trial. The Government's position is that the indictment is specific -- to inform the defendant of the crimes of which they are charged and to allow them to prepare their defense to protect them from any double jeopardy problems.

THE COURT: The fact that it may consist of evidence is not the full answer. One is denied.

MR. YOUTT: The basis of our entire presentation, we have no way of knowing, aside from the indictment, which merely alleges the overt acts against our clients of the receipt of the stolen property on March 13, which is --

THE COURT: That tells an awful lot in a conspiracy. The Government is saying that the role that your defendants played was as a receiver.

Do you say that these defendants participated in a hijacking, the planning or any other part of the conspiracy?

MR. CORCORAN: No, your Honor; knowingly and wilfully purchased goods stolen.

THE COURT: As of now, the Government says that the role that your defendants played was solely as receiver of the stolen goods. Now, that doesn't mean a day or two or three after trial the Government has evidence of any participation they can't amend it.

MR. QUAGLIATA: I inquire as to the role --

THE COURT: Wait.

MR. YOUTT: I take it from that representation again I'm asking to know whether or not the Government will attempt to prove the conspiracy by way of any meetings or contacts aside from the actual receipt.

THE COURT: Now, you're asking for evidence. The Government does not have to --

MR. YOUTT: In order to prepare for trial, in preparation --

THE COURT: I don't say it wouldn't be helpful. Everything you learn from the Government is helpful. That's not the purpose of the bill of particulars. The Government does not say that it has no evidence, and I don't know what evidence it has, but I am not going to direct them to give you any such evidence.

The Government does not say that it has no evidence of your defendant's participation prior to receipt. Am I right, Mr. Corcoran?

MR. CORCORAN: I'm sorry?

THE COURT: Mr. Youtt is trying to tie you down to proof.

MR. CORCORAN: That was my objection.

THE COURT: I'll not direct it. What I just said is when the Government says that these defendants participated in the conspiracy as receivers of the stolen goods, they are not saying that the only evidence you have is evidence that dates from the time of receipt. The Government may very well have evidence to show a meeting between these defendants and the hijackers.

MR. YOUTT: If I may just belabor this a little further. In the substantive offense we know what we are confronted with in a claim that a conspiracy occurred. It could be that the Government has evidence that my clients met --

THE COURT: Would you have it in aiding and abetting? Would you have it in any joint crime?

MR. YOUTT: In a joint crime at least you know the date of the occurrence of the crime; you know the elements necessary for the commission of the crime.

THE COURT: Do you think if the Government charged your defendants in A, B and C with hijacking, that they could not offer proof to show that a day or two or week before they planned this hijacking, to show an intention to steal it and show a joint crime?

MR. YOUTT: In that event --

THE COURT: You really believe --

MR. YOUTT: It would be a two-count conspiracy and --

THE COURT: Don't tell me if it was a substantive crime all the evidence would be clear.

MR. YOUTT: The point of my argument, your Honor, really, we don't know whether the Government is going to come forward with evidence that my clients met March 10th, 11th, 12th and 13th with any defendant. If there is evidence to that effect, the only way we could prepare for trial adequately is to confront that kind of evidence. The indictment doesn't elaborate on the nature of the conspiracy, the extent of the conspiracy other than carrying the parameters --

THE COURT: This conspiracy is no different than hundreds that are charged or thousands that are charged, and your client is entitled to no different rulings than any other defendants that come in. Why should I deny evidence to any other defendants that come in? That's all you are asking for. You want the Government's whole case.

MR. YOUTT: No, I don't want the Government's whole case.

THE COURT: You just want to know when -- if they sat down with any of the hijackers, when they sat down, what was said; right?

MR. YOUTT: Yes.

THE COURT: That's all you want to know.

MR. YOUTT: Yes.

THE COURT: He's saying yes for the record. You don't want the Government's whole case, what else is there to it?

MR. YOUTT: At this point, with respect --

THE COURT: Denied.

Set forth all acts -- denied.

Has any Federal judge ever given you this, Mr. Youtt?

MR. YOUTT: I've never requested this before.

THE COURT: You never did. I never had this either. I had some extreme demands but not like this.

No sense discouraging you.

MR. YOUTT: There is a critical issue which we have to confront in defense of this particular case, and that is whether or not there is anything more than the actual receipt. I've covered it in my substantive argument that Count 1 should be dismissed, but, again, in light of the fact that this is considered pivotal evidence --

In any kind of a case, I think we would be entitled to particularization as to that pivotal evidence, if it exists.

THE COURT: Motion for particulars as requested in the defendant's notice of motion -- your client, Mr. Youtt, in all respects is denied. If what you just said is a motion to re-argue other motions on dismissal, that's denied too.

Now, let's go to yours. I hope you have more success.

MR. MURPHY: I have motions that were submitted.

THE COURT: Where is yours?

MR. MURPHY: Motion for bill of particulars --

THE COURT: You represent Santa, Vincent Santa.

MR. MURPHY: I believe my situation is completely different than his. My defendant is only named in one overt act, and it's not clear.

THE COURT: That does not matter at all. As a matter of fact, the Government didn't have to name your man in any overt act.

MR. MURPHY: I'm completely aware of that.

THE COURT: I have had defense lawyers who represent the most culpable man and say, Judge, the only thing they say in the indictment is overt act 42, all he did was have a conversation.

MR. MURPHY: But it's completely unclear from the overt act whether or not he ever had any conversation; and from what is alleged as to what his participation is --

THE COURT: How much more you are entitled to you got. The Government did say something. I said they weren't required to say anything.

MR. MURPHY: For the purpose of the bill of particulars you should give me certain information.

THE COURT: You may be right. All written recorded statements reduced to writing within the custody and control -- well, that's granted. Did he make any statements?

MR. CORCORAN: No.

THE COURT: Were there any electronic recordings?

MR. CORCORAN: No.

THE COURT: Any eavesdropping?

MR. CORCORAN: No.

THE COURT: Statements of named and unnamed co-defendants I will not give; that's denied, that's 1-B.

Summary reports. Any questions, statements made directly or indirectly to the offenses charged in the indictment. Of course, that's statements. You are able to see tape recordings or conversations and Mr. Corcoran represents they have none; is that right, Mr. Corcoran?

MR. CORCORAN: Yes.

THE COURT: Two; results or reports or physical or mental examinations or scientific tests made in connection with the case or related -- you're talking about physical examinations of witnesses?

MR. MURPHY: Yes.

THE COURT: If they are healthy?

MR. MURPHY: If any --

MR. CORCORAN: The Government will turn over any such reports.

THE COURT: All right.

Do you have any at this time?

MR. CORCORAN: I have handwriting analysis.

THE COURT: I'm talking about physical reports.

MR. CORCORAN: Scientific tests --

THE COURT: Physical or mental examinations. They are saying your witnesses are crazy. They want proof. No witness would testify against these defendants unless they are crazy.

MR. MURPHY: It's possible.

THE COURT: And the last number of cases that attack was made and they had testimony this high (indicating) and in those cases the jury believed those crazy witnesses.

Name and address of witnesses which the Government intends to call.

Do you want to give them any names?

MR. CORCORAN: No.

THE COURT: Denied.

Copies of defendants' criminal records.

MR. CORCORAN: No objection to that.

THE COURT: If any.

MR. CORCORAN: No objection to that.

THE COURT: Do you have it?

MR. CORCORAN: I will turn that over to Mr. Murphy.

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THE COURT: Now, in granting these, Mr. Corcoran, I wish you would understand that relates to all the defendants so they don't have to make other motions. All right?

MR. CORCORAN: Yes.

THE COURT: Pursuant to Rule 16, all books -- I thought you were entitled to all books, documents, so forth that were seized from the defendant. You want everything they have.

MR. MURPHY: That is correct.

THE COURT: No matter how they got it.

MR. MURPHY: That is correct.

MR. CORCORAN: I would object to that.

THE COURT: Motion denied. I direct you to turn over copies of any and all documents, tangible objects which were seized from the defendant.

The defendant moves the Court -- you understand without any demand, you are required to turn over Brady material.

MR. CORCORAN: Yes.

THE COURT: Any question as to what constitutes Brady material -- I think you ought to turn it over.

MR. CORCORAN: I would have an objection to the phrase potential impeachment --

THE COURT: I'm not reading this. I stopped to say Brady material, and all other evidence may be of benefit to the defendant.

MR. CORCORAN: One phrase would seem to call for the yellow sheet, rap sheets of Government witnesses which I would turn over at the time of trial but would not turn over at this time.

THE COURT: It would call upon you to show what becomes beneficial to the defendant. During the trial, mind you, something may arise and you haven't turned it over. I'm going to deny C. In lieu thereof direct you to turn over all Brady material.

Now, you say this, Mr. Murphy, for the preparation of the defense of the defendant -- what document do you talk about?

MR. MURPHY: Any and all documents that they have. I have no information whatsoever.

THE COURT: How do you know it's material?

MR. MURPHY: Well, Judge, obviously if they have any of those documents, then it's material to the defense.

THE COURT: Really.

MR. MURPHY: I would believe if they had a report --

THE COURT: Do you know how many drawerfuls they have and they never offer.

MR. MURPHY: I'm assuming that it's material that they are going to offer it.

THE COURT: If they have a letter from a witness which says that your man was drunk in a bar with him for three days before and three days after the hijack, I would say turn that over, that's material.

MR. MURPHY: Only they would know that.

THE COURT: You may say you don't know whether it's material or not, but when you say it's grounds for motion matters, requested material necessary for preparation of his defense, I don't believe it. That's all.

Now, let's go to the bill of particulars, you tell me whether you consent to any or if you don't consent to any.

How about one, the date, time and place that defendant joined the conspiracy?

MR. CORCORAN: No, your Honor.

THE COURT: Denied.

The places, city, state, district and addresses, apartment and apartment number; make, license number, serial number of automobile where defendants conspired to commit the crime charged.

MR. CORCORAN: I would object to that.

THE COURT: Denied.

Names and addresses of persons originally listed joined in the conspiracy.

MR. CORCORAN: Object to that.

THE COURT: Denied.

The exact words used by defendant which allegedly joined --

Did he at any time say, "I join this conspiracy."

MR. CORCORAN: No.

MR. MURPHY: That's not the situation, but you have a situation where the only place the defendant --

THE COURT: Isn't that usually a fact question. After your client has told you the whole story, and let's assume that he told you that he joined a conspiracy, I dare you to tell me the exact time and place when he joined the conspiracy.

MR. MURPHY: You're going on one presumption; you're going on the presumption he's guilty.

THE COURT: I assume he's innocent. If your client told you the whole story and he admits to you that he joined the conspiracy, I challenge you to fix the precise time and place that he joined the conspiracy. How can that be done?

MR. MURPHY: They allege in the overt act there that he discussed payment or about to discuss payment. Basically I want to know what he did. It says he met with certain people.

THE COURT: That's different. If you want the role generally that the client played, or what the Government said the client played in the conspiracy, that's fair, but beyond that I can't think of much more.

MR. CORCORAN: With request number 4, nothing need be said at all.

THE COURT: In all the conspiracies that you have charged -- you haven't been here too long. On the cases where you had convictions and convictions were firmed -- and again I don't know if you have been here long enough.

MR. CORCORAN: Almost two years.

THE COURT: But I would ask you, and assuming that in those cases where the Supreme Court denied, maybe defendants were involved, could you honestly fix time and place when a defendant joined the conspiracy?

MR. CORCORAN: No.

THE COURT: It would take a magician and a liar to do that.

MR. MURPHY: There is a question, what his extent was in any conspiracy, if any, in the overt acts.

THE COURT: Let's cut it short. Can you tell the defendant Santa what role the Government says he played in this conspiracy?

MR. CORCORAN: Mr. Santa together with a number of his co-defendants were in possession of the goods stolen from the Time-D.C. truck; that they sold them to co-defendants; that I believe the circumstantial evidence will indicate that they in fact participated in the hijacking. That's how they came into possession.

THE COURT: All right. So now you know the role, and that I think is important to prepare the defense, but to ask the words and deeds, the exact days, date, time and place or words and deeds, all you're trying to do is strait-jacket the Government, and that's not the purpose of bill of particulars.

MR. MURPHY: I am only trying to help myself understand. My client has no information that he can give me.

THE COURT: I understand your job as a lawyer, but all I want you to do is to understand it's fruitless to ask for twenty items expecting that maybe you'll get ten, because if you are not entitled to any of it then you won't get one. That's all.

Exact time and place of electronic surveillance -- now, was there any electronic surveillance?

MR. CORCORAN: There was none.

THE COURT: None. I'll say that's answered.

MR. YOUTT: May I interrupt for a moment? My client asks permission to leave at this time.

THE COURT: They don't have to be here. They may leave.

Exact time, dates.

MR. MURPHY: I have no objection.

THE COURT: Take any movies, photographs, videotapes?

MR. CORCORAN: There may be some photographs.

THE COURT: Photographs taken prior to arrest while the crime was committed?

MR. CORCORAN: Photographs of the goods seized.

THE COURT: But they are interested in knowing whether you have sound movies. That's been one of the arguments that defense counsel has made in the last couple of cases; why they had fingerprints -- they had identification by a disinterested witness, or why haven't they got sound movies, so now you know they don't have it. So you could start preparing summation.

Exact time, place and location of any movies; you say there are none.

MR. CORCORAN: None.

THE COURT: None except photos of seized material.

MR. CORCORAN: I believe there are also photos of the car used in the hijacking.

THE COURT: Name and address of any person not named in overt act, Mr. Corcoran?

MR. CORCORAN: Objection.

THE COURT: Denied.

Time of day or night overt act number 3 occurred?

MR. CORCORAN: Objection.

THE COURT: Well, what was the overt act that we are talking about?

MR. CORCORAN: I believe there were conversations.

MR. MURPHY: May I just state this? It's not stated whether there was a conversation. It says that they met to discuss -- is Mr. Corcoran now saying that it was discussed?

THE COURT: There again if there is no direct proof that he had a conversation why should they say that they had a conversation. If all they know is that they met and that was the purpose, why should you be able to come in and object to conversations that they now have because overt act just said they met to discuss but they didn't say it.

MR. MURPHY: How can I prepare to defend the case not knowing whether anything was ever said, whether or not three or four people were gathered.

THE COURT: Isn't it enough to know that the Government claims that they met, you ask your client, did you meet, and if he says no, you get whatever evidence you need that they did not meet.

MR. MURPHY: Suppose he said they met, they didn't discuss that, they were talking about something else, and the position I'm now faced with is a situation maybe there was somebody present who misinterpreted.

THE COURT: You just made my point. What you would like the Government to say is that they met and they discussed specific matters, and if the witness comes in and testifies to something differently you object, claim surprise and everything else.

MR. MURPHY: Okay.

THE COURT: How much do you need to disprove that overt act, just enough of what the Government has already alleged.

MR. MURPHY: I would like to know if there was a conversation.

THE COURT: If Mr. Corcoran wants to give it to you, that's fine with me.

State whether or not receipt of payment was discussed --

MR. MURPHY: That;s correct.

THE COURT: Denied, unless you want to give it.

MR. CORCORAN: No.

THE COURT: State whether Santa, Gomez, Diamond received payment for stolen property.

MR. CORCORAN: Government objects to all these requests.

THE COURT: All of them?

MR. CORCORAN: Yes.

THE COURT: I want you to state whether you now know -- 13 is denied -- whether you now know the names of any co-conspirators that are referred to in the indictment as co-conspirators and not named.

MR. CORCORAN: I don't understand that, your Honor.

THE COURT: Well, the indictment apparently says, and I haven't looked at it recently -- charges that the defendant and other co-conspirators not named herein -- he wants to know whether at this point, whether you now know the names of any conspirators who were not named in the indictment.

MR. CORCORAN: We believe so, people we believe to have been co-conspirators.

THE COURT: Why don't you do that now.

MR. CORCORAN: If we had proof they would be named in the indictment.

THE COURT: The point is do you intend to use any of their activities in the trial. Do you intend to use their statements?

MR. CORCORAN: No.

THE COURT: Intend to identify them in any way during the trial?

MR. CORCORAN: Possibly.

THE COURT: Well, I think they should have those names. Why shouldn't they be prepared?

MR. CORCORAN: This might involve Government witnesses.

THE COURT: You are talking about the safety of Government witnesses?

MR. CORCORAN: Correct.

THE COURT: Are they in custody?

MR. CORCORAN: No.

THE COURT: Do you intend that they be witnesses?

MR. CORCORAN: Yes; at least one.

THE COURT: I'm talking about those that may not be witnesses and not named in the conspiracy -- in other words, a witness may say I was a member of the conspiracy or I told Mr. X that we were going to hijack this truck and was going to sell the merchandise to A, B, C. Now, if there is a possibility that Mr. X was a co-conspirator, I think you should identify that individual so they can prepare to bring that man in or interview him and rebut that witness' testimony.

MR. CORCORAN: The Government will turn over names of other people who may have been involved who it does not intend to call as witnesses.

THE COURT: But who will be identified somehow during the trial. If you turn over everyone who you suspect or believe were also members of the conspiracy, fine, I think that's right. Let them interview them, because if the Government is correct in its charge, if it's true they know them as well as you do, and if you are wrong in your charge, why should they have it so they can disprove the charge. All right.

MR. MURPHY: Thank you.

THE COURT: Do any of the co-conspirators who are named in the employ of the Government or acting at its instance -- I think they are entitled to know that so that they could be prepared to argue that fact question as to whether or not any of these co-conspirators infiltrated the conspiracy.

MR. CORCORAN: I think that might call for the realization of names of possible Government informants who might not be able to testify to relevant facts here, and --

THE COURT: Do you have any witness who at one time was part of this group and later decided to work for the Government, and while working for the Government got information that would be helpful to the Government? You see in those cases it's sometimes a fact question as to when they started working for the Government. Then I charge from there on, any statements, of course, that he makes --

MR. CORCORAN: One of the Government witnesses I would object to revealing at this time was working with the Government at the time of this conspiracy, he would be produced at trial; so there is no problem with the unknown informant, he'll be subjected to cross-examination.

THE COURT: Don't they know who it is?

MR. CORCORAN: I don't know whether they do or not. For his protection, based upon the fact that he is not presently in custody, I would object to revealing his name prior to trial.

MR. MURPHY: If I submit to the Court it's Thomas Cocong (phonetic).

THE COURT: You know him as well as he does.

The only one who doesn't know these things are the Court.

MR. MURPHY: Would your Honor inform me whether or not it's that defendant.

THE COURT: That ought to prove to you that they know all about it.

MR. MURPHY: Maybe that's not the name and I'm 50 miles off, and I believe that to adequately prepare myself under these circumstances that your Honor should direct him.

THE COURT: Then what will happen when he testifies, the jury will be given the appropriate charge as to the value of informant testimony. In addition to that, his relation to the conspiracy terminates a certain date.

MR. MURPHY: Your Honor, may I say this? The only reason I submit his name to the Court, I received that name in motion papers from the U.S. Attorney's Office in Newark with regard to another case involving my client.

THE COURT: 15 denied upon the terms and conditions as set forth.

Time, place, date and manner at which time defendant was identified. Do we have an identification question?

MR. CORCORAN: No.

MR. MURPHY: There is a question who identified him being in those premises in overt act number 3 --

THE COURT: Denied.

State whether all evidence before the grand jury -- denied.

17. State name of person -- denied. Hearsay evidence is admissible but -- our Circuit Court has said you can't perpetrate a fraud on the grand jury by having someone testify as if he had actual knowledge while in fact he was just reading from a file.

MR. CORCORAN: That problem doesn't exist here.

THE COURT: State the date, time, place products mentioned in the indictment were stolen. You say you give the date of the hijacking?

MR. CORCORAN: I believe so.

THE COURT: On or about and between the 24th day of March and the 30th day of April, 1975. Can't you give any closer date than that?

MR. CORCORAN: I believe the truck was hijacked on the evening of the 11th or the morning of the 12th. It was hijacked at gunpoint.

THE COURT: Morning of the 12th of what?

MR. CORCORAN: March.

MR. QUAGLIATA: Shouldn't that day be in the warrant? I think you read it before.

THE COURT: We are talking about the date of the hijack.

MR. O'BRIEN: They say they conspired to possess these goods that were hijacked but it doesn't say when the goods were hijacked.

(continued next page)

THE COURT: 9:15 p.m. on March 11, 1975, tractor trailer owned and operated by Time-D.C. Company -- you are willing to say that on or about March 11, 1975 -- your only thing the hijacking was on or about March 11.

MR. CORCORAN: That's correct.

THE COURT: They might interpret that to show that you were particularizing the claim of the hijack. You say it was taken at gun point.

State the name and address of persons mentioned having stolen the products mentioned in the indictment --

We'll have to suspend here. There is a man in custody who has to be sent back.

Do any of you want anything else that was given?

MR. YOUTT: The aspect of my motion, statements and reports of statements.

THE COURT: Mr. Quagliata indicated he is going to represent Mr. Diamond at that time.

MR. CORCORAN: Mr. Quagliata doesn't represent Mr. Diamond, he represents Mr. Gomez.

MR. QUAGLIATA: I'm appearing for Mr. Coiro for the purpose of setting a trial date and for the purpose of this discussion.

MR. CORCORAN: Mr. Coiro represents Mr. Diamond.

THE COURT: Did I ask you about possible

conflict?

MR. QUAGLIATA: Yes, you did.

THE COURT: What else is there?

MR. O'BRIEN: I want to know what role Mr. Maloney played in this conspiracy.

MR. CORCORAN: Possession of the stolen goods.

THE COURT: As far as the Government goes, there is no knowledge that he participated in the actual hijacking.

MR. CORCORAN: Not at this time.

THE COURT: Can you satisfy the others on the role that the Government says that they played, that would be Mr. Gomez and Mr. Diamond?

MR. CORCORAN: Mr. Gomez and Mr. Diamond would be alleged by the Government to have participated in the hijacking as well as the possession; their possession resulted from hijacking this particular truck.

MR. QUAGLIATA: May I inquire if there is going to be an identification of either Gomez or Diamond regarding the hijacking?

MR. CORCORAN: At this time I can't say, your Honor.

MR. QUAGLIATA: It's going to be important that I find that out.

THE COURT: If the Government doesn't have the evidence now, but a day before they have a witness that's ready to identify them, why should the Government say now no identification witness. They are offering it and then they have to overcome your objection. It's not charged with hijacking and this is gratuitous on Mr. Corcoran's part, but I'm in favor of giving defendants all the information that the Government possibly could give without in any way endangering the Government's case.

MR. QUAGLIATA: I don't want to endanger anybody's case.

THE COURT: If I was a defense lawyer I would want to. That's not what he's saying. I understood Mr. Corcoran to say that they don't have witnesses at this time. You didn't say you have a witness that you don't want to identify him.

MR. CORCORAN: If he's saying the driver of the truck, we don't have an identification at this time.

THE COURT: At this time he can't pick any of the defendants out or anyone else as the hijacker.

MR. CORCORAN: To my knowledge.

THE COURT: There you have more than you are entitled to.

MR. QUAGLIATA: Next thing I want to know whether or not there was a complaint as to Gomez, it was filed on October 9, 1975, and it states that reliable informant tells them that Gomez admitted renting a car used in the above-mentioned hijacking. I want to know if at the time that statement was made by Gomez, whether or not that person was an agent of the Government, whether he is, speaking specifically to paragraph 2 in the complaint.

THE COURT: Was that the informant?

MR. QUAGLIATA: Was he a Government agent at the time of the activity -- paragraph 2 of the complaint.

MR. CORCORAN: I'll have to know what Mr. Quagliata means by Government agent.

THE COURT: One who the Government used to obtain information, he met for the purpose of obtaining this information, and that defintion of Government agent, he would have been playing as agent at that point. You may call him special employee; you may call him informant, but that the Government regards him as an agent, not on the payroll but as an agent and cooperating with the Government.

MR. QUAGLIATA: Will the Government consent to a hearing to declare those statements, to determine whether or not those statements were made without proper warnings.

THE COURT: I could tell you without Mr. Corcoran telling you, he didn't give the proper warnings, Miranda warnings. This wasn't after arrest.

MR. QUAGLIATA: I understand. I understand what you are saying. In the light of that, could we have all of the material regarding, either now or sometime before trial regarding, if he was a paid informant, the vouchers that the Government may have.

THE COURT: That's up to Mr. Corcoran. This is 3500 material. Certainly his statements are concerning his meeting. I think that the Government must supply all the information on the question of motive.

MR. CORCORAN: I agree.

THE COURT: I expect Mr. Corcoran will supply all the material on promises made, if he happened to be involved in the case; representations. I insist on all that for the Government's sake, for my sake and for defense counsel's sake, because if defendants are found guilty and they are sentenced, they spend all their time going over the transcript and consulting with the other lawyers who are housed in the prison. That results in a lot of 2255's, so

I try to limit in advance as many grounds as possible.

MR. QUAGLIATA: I just have one other brief question. Is it my understanding, your Honor, that the Government has nobody in custody that is alleged to be one of the co-conspirators mentioned in the indictment?

THE COURT: I don't know.

MR. QUAGLIATA: You said they should turn that over?

THE COURT: Anyone in custody.

MR. QUAGLIATA: Yes.

THE COURT: Anyone in custody I would demand of the Government lawyer, must be afforded access by defendant's counsel. As a matter of fact, this has been my practice a long time, and I think the Court of Appeals made that clear; IBM against Eddie Stein.

MR. CORCORAN: And, of course, your Honor would exclude the situation where a witness did not wish --

THE COURT: I want him to say that in open court. If you feel that there is a danger to the witness's life or his family then I will say that I would wait until a day or two before trial, or even longer if it's convenient, and put him on the witness stand and explain he is not a Government witness, and

I'll direct the Government to make certain that it doesn't give any witness the impression that the witness is owned by the Government; obviously that they have the testimony that is helpful to the Government and that's why the Government is calling them, but other lawyers, defense counsel have a right to see them if the witness wants to see them, a right to talk with him, if the witness wants to talk with him, but he should make that decision unfettered by any idea that he's a traitor to the Government because he talks to other counsel. I have found if it's explained in open court on more than one occasion, Government witnesses want to talk to defense counsel. Try to tell that to his friends on the other side, and few occasions has defensen counsel called Government witnesses.

MR. QUAGLIATA: I did, Judge.

THE COURT: There you are, so it's not unusual. It doesn't happen often. The point that has to be made that the witness understands that there is nothing wrong with talking with defense lawyers.

MR. CORCORAN: That an informant-type witness be produced for defense counsel?

THE COURT: I'm talking about witnesses that are in custody, at least theoretically, have access to anybody on the street when the Government has the witness in custody. First as a practical matter, he is under the control of the Government and you have a feeling that the witness feels that he belongs to the Government and he may have information that may have --

MR. CORCORAN: Even where a witness is relocated under a protection program, the confirmation of his identity prior to trial creates security problems, and to bring him in to question him as to whether or not he wants to discuss --

THE COURT: That's unfortunate, but I can tell you this, I insist that such witnesses -- has been reasonable time before they testify. They give access to defense counsel.

MR. MURPHY: May I just be heard? At this time I can't possibly see any argument for the U.S. Attorney informing me as to whether or not it's Thomas Gogong, who is their informant in this case. He's in protective custody at this point.

THE COURT: If they think that it might place some life in jeopardy, not necessarily the individual named, but the Government may feel that the defendant, not their counsel, the defendant may feel it's one of two or two or three, and if they eliminate the one or two they'll identify the other one.

Now, we have had occasions where Government witnesses were done in. When I first came on the bench I thought it was movie stuff. I'm not going to take the responsibility.

MR. MURPHY: His name was provided to me by the U.S. Attorney's Office in Newark, as the informant on another matter, a similar matter to this; to expedite matters and to give me an opportunity to prepare, if he's the same informant, whether he's informant on that case or the informant on both cases --

THE COURT: If I was a betting man I would say the odds are 100 to 1 that he is, but the point is if he's not and it gets back to your fellows, and let's assume in the first we have for these purposes, that then they find that it is someone else and that identifies him by elimination, or if they decide to now find out in earnest someone might get hurt.

MR. MURPHY: If that's the situation and he's the informant, wouldn't it be the best thing to inform us that the's the informant?

THE COURT: Maybe, not always.

MR. MURPHY: They already know he's the informant in one case. Why create a situation, assuming these people were like that, that they would go looking for someone else.

THE COURT: That's up to Mr. Corcoran. I don't know how people act or react, and I'm not going to second-guess Mr. Corcoran. I would like to say, supply the name of the informant, but I wouldn't sleep nights if I did that, and someone was seriously hurt or killed and he happened to be connected with the case, and it might be traced to this kind of information.

MR. MURPHY: He's in protective custody. We'll be given his name in a reasonable time?

THE COURT: I don't say reasonable time, before trial; I say before he testifies. It depends on the mechanics, when they bring him in, the transportation division, whatever they call it of the Bureau of Prisons. I, for example, know that on occasion defendants would like to know, find out where a witness is being held in protective custody. They may have to move him the day before, and I'm not going to insist on a specific date. All I can tell Mr. Corcoran, as soon as possible if he's going to testify on Wednesday, I would say by Tuesday afternoon he be brought in, say to the lawyers, there he is, now do you want to talk to the lawyers.

MR. QUAGLIATA: May I speak, sir?

THE COURT: Yes.

MR. QUAGLIATA: Regarding the way you decide the bill of particulars regarding the unindicted co-conspirators, if they are going to get those acts in.

THE COURT: Identity -- Mr. Corcoran said he would give you that. He's giving you more than I suggested.

Now, the trouble is we are not always sure when someone is a co-conspirator, maybe he is, maybe he isn't. Mr. Corcoran said we believe these individuals to be conspirators in this conspiracy.

MR. QUAGLIATA: That's what I'm talking about. Mr. Corcoran seems hesitant and unsure. I'm curious whether we'll get that information.

THE COURT: Should be time enough if it's going to be helpful they could interview these people if they want.

MR. CORCORAN: I do have to re-interview some individuals myself in order to ascertain all the people.

THE COURT: When is this set down for trial?

MR. CORCORAN: December 1 but that date was set three weeks ago, it's no longer a jail case. I would think that five weeks is rather a short time.

THE COURT: You have no one in custody?

MR. QUAGLIATA: Mr. Coiro's client is doing time on a state charge, on a different matter.

THE COURT: When do you suggest?

MR. MURPHY: March.

THE COURT: 1976 you're talking about?

MR. MURPHY: Yes.

MR. QUAGLIATA: March is a reasonable date, I would respectfully suggest to the Court.

THE COURT: Why?

MR. QUAGLIATA: As far as my schedule is concerned, I don't speak for the other attorneys, because on December 15 I intend to try a homicide case in the Bronx.

THE COURT: December 15.

I have a Gomez case down and it says U.S. against Gomez. Is there another indictment?

MR. QUAGLIATA: That came about piecemeal, they were arraigned at different times.

THE COURT: This says four days.

MR. CORCORAN: This is 762.

THE COURT: But I have one down for Gomez, December 1.

MR. CORCORAN: That's not this case.

MR. QUAGLIATA: There is only one case for

Gomez.

THE COURT: There may be another Gomez.

MR. QUAGLIATA: My recollection is that your Honor did set it down. I'm curious whether your Honor --

THE COURT: You didn't estimate four days.

THE CLERK: Wrong number.

THE COURT: I'll tell you what I'm willing to do, I'll put it down for February 2nd.

MR. QUAGLIATA: I have to try one in Newark.

MR. MURPHY: February 12th.

MR. O'BRIEN: On January 19th.

THE COURT: Lincoln's birthday.

MR. MURPHY: Set down before Judge Lacey.

THE COURT: You'll be through with this one.

MR. MURPHY: It involves defendant Santa also in that case over there, and I would hate to start over here and get tied up over here and then go right over there to try that.

THE COURT: Four day case -- can't be four days.

MR. O'BRIEN: On January 19th I'm to start a trial before Judge Platt, the Government estimated it will take four weeks to try.

THE COURT: How long will the case take before

Judge Lacey?

MR. MURPHY: I would estimate approximately three weeks.

THE COURT: What kind of case is it?

MR. MURPHY: Hijacking conspiracy.

THE COURT: Three weeks?

MR. MURPHY: Yes.

THE COURT: I'll tell you what,I'm putting this down for February 23rd, and I tell you, I expect you to be here. You're not going to be three weeks before Judge Lacey.

MR. MURPHY: Assuming that I'm there on this trial --

THE COURT: If you are actually there I won't expect you here; if you're not there I expect you here, and I'm telling you, you be here.

MR. MURPHY: I hope you are right.

THE COURT: You never intended to be there three weeks on a hijacking case.

How long do you think this case will take?

MR. CORCORAN: There are some aspects -- it might take a little longer.

THE COURT: You said four days originally.

MR. CORCORAN: It might be a week, week and a half, depending upon the length of cross-examination and number of similar acts that your Honor might allow.

THE COURT: Did you talk to Mr. Appleby about similar acts? He just made -- the jury said they couldn't agree after deliberating two hours; he probably thought I was wrong and unfair, both, but I just won't allow any type of crimes to come in. Our Circuit is very limited on similar acts but I think you ought to tell the other side what you intend to offer under similar acts before the trial. Submit a very short memorandum, very short, on similar acts, because I have had this too many times. I said there must be something that Identifies this type of crime, not just other hijackers.

Now, on receipt of stolen goods, if it goes against Mr. Youtt's client, if you could show those prior criminal acts, I think they are always admissible, I put those aside, those claims where we have crimes of violence where it's difficult to identify, so you bring in other crimes to show that this fellow committed the criminal act. You must be careful to make certain that they are not just being convicted of the other acts, but in receipt of stolen goods; legitimate businessmen saying, well, I didn't know that it was stolen, because that's the usual defense. You see now there it falls squarely in the cases that say, were the real live issue if criminal intent, there, of course criminal acts are admissible, but I have trouble with crimes of violence because I say in the last case, armed bank robbery, Mr. Appleby introduced seven bank robberies. I would not permit it because those other crimes showed something a little different than the normal way of committing the criminal act, and the example I gave wasn't pertinent, but the example I gave, if a bank robber came into this bank robbery charge with two guns and shot two bullets into the ceiling and then they showed in another bank robbery it was done the same way, then almost as a matter of personal habit you might show that this was rightly the fellow, there you could show similar acts. For example, if you are trying to show hijacking or -- oh, that's probably more restrictive than acts showing prior receipt of stolen goods. If it's just the usual hijacking where they take over a truck, or where they might not use a gun on the driver, well, I might not allow it. If, for example, they use a certain type of disguise, drove the truck around in a certain neighborhood, said certain things to him, that might sort of identify him with this crime -- yes, I might, but not just coming in and saying, well, we want to prove that he committed ten other hijackings. I don't know whether my ruling is more limited than Denton; Denton says in effect, as I interpret it, you may submit proof of similar acts so long as it's submitted solely to prove criminal character, and then it goes on and says it may be used to prove criminal intent or design or other issues in the case. WEll, obviously, if the proof here is that someone used a gun on the driver and the act is approved, criminal intent isn't an issue really; it's whether I indeed was the same fellow who committed that act. The other circuits are more restrictive on other similar acts, but I don't think they ever intended to say every crime that falls in the same category is admissible to prove the crime charged here. So there you have a guide. More and more in my own mind I'm formulating that idea because I've had a lot of trouble in my own mind in permitting other acts that really are introduced just to show that the fellow is an armed robber or any other type of criminology.

MR. MURPHY: Thank you, your Honor.

THE COURT: The hearing on the seizure of the bills of lading and so forth will be immediately before trial. That should not take long.

MR. QUAGLIATA: May I inquire as to another matter? There was a case Mr. Coiro was supposed to try subsequent to this case, a one-defendant case.

THE COURT: Yes.

MR. QUAGLIATA: He's on trial; he told you at the time before Judge Leahy, and that case is going to go past December 1st.

THE COURT: Then we can't try it.

MR. QUAGLIATA: It definitely will --

THE COURT: He won't have a problem if it's on. After that's done he must hold himself in readiness.

MR. QUAGLIATA: He's very familiar with what your Honor is thinking about.

THE COURT: He takes too much work, too many engagements.

MR. QUAGLIATA: Right after that we'll get in touch with your chambers.

THE COURT: All right.

MR. QUAGLIATA: I'm not sure of the assistant, I think it's Miss Amon.

THE COURT: I think so.

MR. QUAGLIATA: We won't have to appear on December 1?

THE COURT: No. If he calls and tells me

he's still engaged and will be engaged.

MR. QUAGLIATA: All right.

(Whereupon Court stood in recess in this matter.)

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :

-against- :

MANUEL V. GOMEZ, STANLEY DIAMOND, VINCENT SANTA, FRANK JOSEPH MALONEY, CHAIM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER, :

Defendants. :

- -x

75-CR-762
J.M., U.S.D.J.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavits of Steven Thal, Esq., dated March 1, 1976, the memorandum in support thereof, the indictment and all the prior proceedings herein, the defendants, CHAIM KAHAN, SOLOMON WERCEBERGER and MOR WERCEBERGER will move this Court before the Hon. Jacob Mishler on March 19, 1976, at 10:00 A.M., or as soon thereafter as counsel can be heard, in the United States Courthouse, 225 Cadman Plaza, Brooklyn, New York, for an order pursuant to Rule 41 (f) F. R. Crim. P. suppressing all of the evidence seized by the Federal Bureau of Investigation and any other Government agents from the premises of defendants at CBS Warehouse, Inc. on or about March 13, 1975 pursuant to a search warrant issued by the Hon. Vincent A. Catoggio on March 13, 1975 upon the grounds that the aforesaid warrant was issued without probable cause and that the evidence seized was therefore the product of an unreasonable search and seizure; and for such other and further relief as to this Court seems just and proper.

Dated: New York, New York
March 1, 1976

Yours, etc.

THAL & YOUTT

By
A Member of the Firm
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- x

UNITED STATES OF AMERICA, :

-against- :

MANUEL V. GOMEZ, STANLEY DIAMOND, VINCENT SANTA, FRANK JOSEPH MALONEY, CHAIM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER :

Defendants. :

- x

AFFIDAVIT IN SUPPORT OF MOTION

75-CR-762
JM., U.S.D.J.

STATE OF NEW YORK) ss
COUNTY OF NEW YORK)

STEVEN THAL, being duly sworn, deposes and says:

1. I am an attorney at law, admitted to practice in this Court and a member of the law firm of Thal & Youtt, attorneys for defendants Chaim Kahan, Solomon Wercberger and Mor Wercberger.

2. On November 17, 1975, defendants made an omnibus motion which included, inter alia, a motion to suppress evidence. This motion focused on the seizure of certain papers pursuant to the search warrant and a seizure of other papers pursuant to a subpoena.

3. As of the time of making the aforesaid motion, counsel had not had an opportunity to review the affidavit in support of the search warrant since it was not yet in the Court file and Assistant United States Attorney Corcoran had not supplied a copy to counsel.

4. At the hearing on November 21, 1975, counsel requested a probable cause hearing but again did not focus on the seizure of the allegedly "stolen" merchandise. Counsel's

prime interest at that time was the seizure of papers pursuant to the search warrant and the seizure of papers pursuant to a subpoena. Counsel stated:

> "I have not seen the affidavit, your Honor. The basis - the principal basis of my motion with respect to a seizure of material which was taken incidental to the execution of that particular warrant; and the second --"
>
> ***
>
> "And the second basis of my motion is a search which took place the following day pursuant not to that search warrant but to a subpoena which was issued -- There was no search warrant which supported research on the second day."
> (pp. 12-13 transcript).*

5. The Court on its own initiative inquired into the probable cause for the search warrant and counsel responded that he had not seen the affidavit but he would like to have the probable cause before the evidence is introduced.

> "THE COURT: Was this procedure pursuant to a warrant?
>
> ***
>
> (further inquiry regarding the warrant)
> THE COURT: I thought you said it was insufficient as a matter of law.
>
> MR. YOUTT: I have not seen it.
>
> THE COURT: How can you say that without seeing it?
>
> MR. YOUTT: That's not the principal basis of my motion to suppress, but I would like to have the probable cause supporting it before the evidence is introduced; and again, I have no evidence with respect to what was the probable cause supporting that particular search warrant."
> (pp. 10-12, transcript)

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* All references are to the transcript of the hearing on November 21, 1975, relevant portions of which are attached hereto as Exhibit A.

6. The Court then read the contents of the affidavit into the record (p. 14, transcript) and concluded that there was probable cause based on the affidavit. The Court also denied defendants' motion to suppress documents seized pursuant to the subpoena and granted an evidentiary hearing at the beginning of the trial with respect to the incidental seizure of papers pursuant to the search warrant.

7. Since the time of that hearing, where the contents of the affidavit were first revealed, I have been attempting to learn more about the facts underlying the affidavit.

8. During the period February 17 - February 24, I spoke with Mr. Donald Shannon, counsel to Schick, Inc., (the manufacturer of the goods in question) a number of times and learned from him the meaning of "Spec. No. 02-40" which is the identification for the seized goods in the probable cause affidavit. (A copy of the affidavit is attached as Exhibit B). Mr. Shannon advised me that this number is solely a designation of the contents of the carton, to wit: Schick II razors and blades. All boxes of these items are so marked. Cartons with other contents contain a different designation. For example, boxes containing injector razors and blades are marked 002-64. Mr. Shannon further advised me that the Spec. No. cannot be used to identify a shipment, its source or any other information except the contents of the cartons. To illustrate the meaning in another area, this designation is the same as, e.g., an "Oldsmobile 88" or a "Lincoln Continental Mark IV." Every model of these automobiles would bear the identical numbers.

9. I have requested an affidavit from Mr. Shannon confirming this information.

10. On February 25, Mr. James Stedronsky of my office contacted Assistant U. S. Attorney Corcoran to learn if there was any other testimony or documents given to the Magistrate to supplement the probable cause affidavit. He was advised that the sole basis for the search warrant was the affidavit.

11. Based on the foregoing information and a close reading of the affidavit it seems clear that it does not establish probable cause on which to search the defendants' premises. (In view of the Government's concession that only the probable cause affidavit was considered by the issuing Magistrate, it is clear that only the affidavit may be considered by this Court in reviewing the sufficiency of the probable cause determination.) The basic defect in the affidavit is its failure to allege facts from which a neutral magistrate could conclude that probable cause existed to believe that the goods allegedly observed in defendants' warehouse were the same goods that had previously been hijacked. This is clearly an essential element, since the goods were not contraband, and their mere presence in a warehouse would provide no ground even for mere suspicion.

12. The affidavit is based in part on observed fact and information supplied by a reliable informant, to wit:

a) The report of a truck driver that his truck was hijacked and that "6910 cartons of Schnick [sic] razors and toilet products" were taken;

b) a reliable informant reported that he observed in the premises of CBS Warehouse "several thousand cartons of Schnick [sic] super two bonded razors bearing the Schnick, Inc. [sic] Spec. No. 02-40 on the cartons."

13. A careful reading of the affidavit shows that there is nothing to tie the contents in the warehouse to the hijacked merchandise.

14. It appears there are a number of defects in the causal chain between the hijacked merchandise and that which was seized.

a) The truck driver's report did not specify what kind of Schick products were taken except "razors and toilet products." There is no reference to "Spec. No." in that part of the affidavit reciting the theft report;

b) The observation of"Schick super two bonded razors" at CBS is in and of itself meaningless. No doubt such a common product could be observed in hundreds or thousands of places throughout the United States on that same day;

c) The Spec. No. 02-40, (which is not reported as having been stolen from the truck in any event) is also a meaningless reference. As recited earlier in my affidavit, this Spec. No. is marked on all Schick boxes containing Super two razors and blades. It is like a model number. For example, Schick Injector razors are labeled 002-64. These numbers are not serial numbers which can positively and specifically identify a shipment;

d) The affidavit fails to demonstrate that the number 02-40 is even significant for purposes of identification; for all that appears the number might mean anything, or nothing.

15. The affidavit suggests a certain causal link or identity of the goods by reciting that the goods were hijacked on March 11, 1975, and that similar goods were observed in defendants' warehouse on March 12, 1975. These facts might be somewhat persuasive if, in addition, the informant had stated that the goods were not present in the warehouse immediately before the hijacking, or, better, if he or someone else had observed the goods being unloaded at the warehouse shortly after the time of the hijacking. But as the affidavit stands, there is nothing to indicate that the goods observed had not been present in the warehouse before the hijacking; and, again, similar observations might have been recorded at any number of other warehouses regularly handling Schick products;

16. The allegations regarding the reliability of the Government's confidential informant do not, of course, cure the probable cause deficiency. The fact that the informant may have given reliable information in the past does not satisfy the burden of showing some of the underlying circumstances indicating that his present information is accurate. Still less does it bolster the probable cause showing when the present information is entirely wanting in that respect. Here, Special Agent Colgan and the issuing Magistrate drew the conclusion

that the goods seen at defendants' warehouse were the stolen goods; defendants' contention is simply that the informant's observation, taken as accurate, fails to supply probable cause for such a conclusion, even when considered with all the information contained in the affidavit. In short, the informant's reliability or credibility is not the issue here.

17. In summary, it is fair to conclude that the affidavit alleges only two basic facts: That Schick products were hijacked from an interstate shipment, and that Schick products were observed the next day in a warehouse. As more fully set forth in the annexed memorandum of law, this is a grossly inadequate basis for a finding of probable cause to believe that the goods observed were in fact stolen.

Steven Thal
STEVEN THAL

Sworn to before me this
1st day of March, 1976
Ruth I. Kramer

RUTH I. KRAMER
NOTARY PUBLIC, State of New York
[illegible]
[illegible]
Commission Expires March 30, 19 76

is introduced against all defendants, and if at that point it becomes apparent that the Government's case is not going to be supportable on the conspiracy issue against these defendants whom I represent, it will be too late to cure the record and give them a fair trial.

THE COURT: Is that an additional motion?

MR. YOUTT: Additional motion. It's the basis of our motion for separate trials from the other co-conspirators in this case.

THE COURT: Motion denied. Next.

MR. YOUTT: The next section of the motion, I believe -- I haven't looked at the order of things, it's into the question of motion to suppress evidence, which are indicated may require the taking of testimony in an evidentiary hearing which I would ask for an — adjournment until the trial. The remainder of the motion is addressed to discovery matters which I think we could dispose of today.

THE COURT: Was this procedure pursuant to a warrant?

MR. CORCORAN: Yes.

MR. YOUTT: There was another search the following day which was pursuant to a subpoena.

THE COURT: I assume it was a warrant out of

EXHIBIT A

our Court.

MR. CORCORAN: Yes sir.

THE COURT: Based on the affidavit of Donald E. Dowd.

For the complaint of Donald E. Dowd sworn to March 14 --

MR. YOUTT: That was the arrest.

MR. CORCORAN: It was a prior search warrant.

THE COURT: What was the date of the search warrant?

MR. CORCORAN: I believe it was the 12th of March.

THE COURT: Twelfth of March. Is there a Stanley Diamond in this case?

MR. CORCORAN: Stanley Diamond.

THE COURT: There was. I have the Magistrate's file.

MR. CORCORAN: The affidavit for a search warrant was sworn to before Magistrate Kotogio (ph) the 13th of March, 1975 by Agent Patrick Colgan.

THE COURT: I can't find it. May I have a copy of it?

MR. CORCORAN: Yes sir.

MR. YOUTT: I don't have a copy of it. I have never seen it, your Honor.

THE COURT: I thought you said it was insufficient as a matter of law.

MR.YOUTT: I have not seen it.

THE COURT: How can you say that without seeing it?

MR.YOUTT: That's not the principal basis of my motion to suppress, but I would like to have the probable cause supporting it before the evidence is introduced; and again, I have no evidence with respect to what was the probable cause supporting that particular search warrant.

THE COURT: So what you want to do, you're contesting the allegations in this affidavit. You are saying that they are not true.

MR.YOUTT: I have not seen the affidavit, your Honor. The basis -- the principal basis of my motion with respect to a seizure of material which was taken incidental to the execution of that particular warrant; and the second --

THE COURT: Do you have the warrant?

MR. YOUTT: And the second basis of my motion is a search which took place the following day pursuant not to that search warrant but to a subpoena which was issued, a Grand Jury subpoena, which was issued and executed on that particular day. There was no search warrant which supported research on the second day.

Now, I don't even know, your Honor, whether anything that was obtained on the second day will be used or lead to evidence which the Government --

THE COURT: Let's take one thing at a time.

MR. CORCORAN: I do not have a copy of the warrant in this file.

THE COURT: Your motion says you are seeking suppress upon the grounds that said seizure of evidence is unsupported by probably cause, and is a product of unreasonable search and seizures.

MR. YOUTT:That's correct, your Honor.

THE COURT: Well, I always thought that if the affidavit or other evidence before the Magistrate at the time of the issuance of the warrant showed a probable cause that that was it.

MR. YOUTT:Your Honor, that's with respect to the evidence that was seized pursuant to the warrant.

(Continued on next page)

THE COURT: Let me look at the sufficiency of the affidavit with respect to that.

Here is what Patrick F. Colgan says: He received a communication from the Federal Bureau of Investigation from a Mr. James Lester, an employee of Time-D.C. TRucking Corp., of Secaucus, New Jersey, that a trailer owned and operated by Time-D.C. Trucking Corp., and bearing California license plate # WY6336 was hijacked on March 11, 1975. Mr. Lester further advised taking from the trailer 6,910 cartons of Schick razors and products which cartons were being shipped from the Schick, Inc., West Haven, Connecticut to Anaheim, California. A reliable confidential informant, who has previously supplied information to the Federal Bureau of Investigation which information has resulted in the arrest of one individual for the theft of approximately $75,000 worth of stolen merchandise and whose information has also led to the recovery of approximately $25,000 worth of hijack property and the arrest of two individuals in connection with that hijacking has stated, that he was in the above-described premises known as CBS Warehouse on March 12, 1975. While in the above-described warehouse the reliable informant observed several thousand cartons of Schick Super-Two Bonded Razors bearing the Schick, Inc. spec number 02-40 on the cartons.

Do you think that's sufficient probable cause? That's the warehouse that was searched, right?

MR. YOUTT: That was the warehouse that was searched.

THE COURT: "CBS Warehouse, Inc., a multi-story red brick building known as Building No. 58 located at the foot of 50th Street, Brooklyn, New York" —

I don't require a hearing on that. The motion insofar as it challenges the seizure of evidence based on this affidavit on the grounds that it fails to show proper cause is denied.

Now, let's go to some other evidence that was seized through a subpoena, Mr. Corcoran.

MR. YOUTT: Before that, there was a matter of obtaining of certain supporting documents, documents received in connection with this shipment, which the agents who were executing this particular warrant obtained from the defendant on the say of the arrest.

Now, when in terms of a period of time --

THE COURT: Now, wait. You are talking about a third thing. You are talking about a search incidental to the arrest.

EJD:SD:lp
F.#751,400

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA

-against-

PREMISES KNOWN AS CBS WAREHOUSE, INC., A MULTI-STORY RED BRICK BUILDING KNOWN AS BUILDING NO. 58 LOCATED AT THE FOOT OF 50th STREET, BROOKLYN, NEW YORK

Defendant.

- X

AFFIDAVIT FOR A SEARCH WARRANT

(T.18, U.S.C., §659)

EASTERN DISTRICT OF NEW YORK, SS:

PATRICK F. COLGAN, being duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation, duly appointed according to law and acting as such.

Your deponent has reason to believe that there is presently being concealed in the above-described premises a quantity of cartons bearing the name Schick, Inc., with the Spec No. 02-40 on the said cartons which cartons have been stolen from Interstate Commerce in violation of Title 18, United States Code, Section 659.

The facts tending to establish the grounds for the issuance for a search warrant for the above-described premises are as follows:

(1) A communication to the Federal Bureau of Investigation from a Mr. James Lester, an employee of Time-D.C. Trucking Corp., of Secaucus, New Jersey, that a trailor owned and operated by Time-D.C. Trucking Corp., and bearing California License Plate No. UY5336 was hijacked on March 11, 1975. Mr. Lester further advised taking from the trailor 910 cartons of Schick razors and toilet products which cartons were being shipped from the

EXHIBIT B

Schnick, Inc., West Haven Conn. to Anahiem, California.

(2) A reliable confidential informant, who has previously supplied information to the Federal Bureau of Investigation which information has resulted in the arrest of one individual for the theft of approximately Seventy-Five Thousand Dollars ($75,000) worth of stolen merchandise and who's information has also lead to the recovery of approximately Twenty-Five Thousand Dollars ($25,000) worth of hijacked property and the arrest of two individuals in connection with that hijacking has stated, that he was in the above-described premises known as CBS Warehouse on March 12, 1975. While in the above-described warehouse the reliable informant observed several thousand cartons of Schnick super two bonded razors bearing the Schnick, Inc., Spec No. 02-40 on the cartons.

WHEREFORE, your deponent respectfully request that a search warrant be issued authorizing Special Agents of the Federal Bureau of Investigation to enter in day the premises known as CBS WAREHOUSE, INC., A MULTI-STORY RED BRICK BUILDING KNOWN AS BUILDING NO. 58 LOCATED AT THE FOOT OF 50th STREET, BROOKLYN, NEW YORK, and there to search and seize the above-described property to the end that the same may be dealt with according to law.

Patrick J. Colgan Jr.

Sworn to before me this
13 day of March, 1975.

VINCENT A. CATOGGIO

UNITED STATES MAGISTRATE
EASTERN DISTRICT OF NEW YORK

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss.:

HEATHER JOHNSTONE, being duly sworn, deposes an says: that deponent is not a party to the within action, is over 18 years of age and resides at 144-25 Roosevelt Avenue, Flushing, New York. That on the 2nd day of March, 1976, deponent served the within Notice of Motion, Affidavit and Memorandum of Law upon Paul Corcoran, Esq., Assistant U.S. Attorney, Eastern District of New York, 225 Cadman Plaza, Brooklyn, New York 11201, by depositing true copies of same enclosed in a postpaid, properly addressed wrapper in an official depository under the exclusive care the custody of the United States Postal Service within New York State.

Heather C. Johnstone
HEATHER JOHNSTONE

Sworn to before me this
2nd day of March, 1976

Kramer
Notary Public

RUTH I. KRAMER
NOTARY PUBLIC, State of New York
No. [illegible]
Qualified in New York County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---------------------------------------X

UNITED STATES OF AMERICA,

-against-

75-CR762

CHAIM KAHAN & SOLOMON WERCHBERGER,

Defendants.

---------------------------------------X

United States Courthouse
Brooklyn, New York

March 19, 1976
10:00 A.M.

BEFORE:

HONORABLE JACOB MISHLER, CHIEF U.S.D.J.

PERRY AUERBACH
ACTING OFFICIAL COURT REPORTER

APPEARANCES:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: PAUL CORCORAN, ESQ.
Assistant U.S. Attorney

THAL & YOUIT, ESQS.
Attorneys for Defendant

BY: STEVEN H. THAL, ESQ.

THOMAS O'BRIAN, ESQ.
Attorney for MAHONEY

THE CLERK: Criminal motion, United States against Chaim Kahan, Solomon Werchberger, Frank J. Mahoney and Vincent Santo.

THE COURT: You have some motions to suppress on what grounds?

MR. CORCORAN: Your Honor, this motion is based on sufficiency on the affidavit of a search warrant in this case.

Your Honor reviewed that affidavit in open court on November 21, 1975, and initially held the affidavit sufficient and denied this same motion.

Some three and a half months later, in the last two weeks, counsel for Kahan and Werchberger have filed these papers.

If your Honor is going to entertain a renewed application based on those grounds, I would ask an additional time to file the Government's --

THE COURT: Is this the same motion?

MR. THAL: No, your Honor. We initially filed an omnibus application and cited two grounds for it. One of the papers seized incidental to the seizure of cartons of goods allegedly stolen, and also the suppression of documents seized pursuant to a subpoena.

At that hearing on November 21, your Honor, in your own initiative, decided to look at the affidavit in support of the search warrant.

I have set forth the transcript in support of that affidavit.

The first time we, as defense counsel, heard it, was when your Honor read it in open court that day, and Mr. Youtt argued that motion, clearly says they were not the basis for the motions made at the time.

If I may explain that for a moment, the affidavit that your Honor read,and which I have next to my paper contained at one point the numbers, Schick product Nos. 02-40, and in hearing it in open court, it sounded like a number that had significance and meaning, and it wasn't apparent to us that there could be any meaning to it other than any significance basically, although we, as counsel, decided to undertake an investigation.

Lo and behold, we found that the number 02-40 Model 88 marked H, it's simply that it indicated that the contents of the carton were Schick Track II shaving or razor blades, and I guess manual razors.

We then brought on that motion filed approximately three weeks ago for two reasons; one, having delayed a motion and learning of information, and having sat quietly by while the Government prepared its case, and the second reasons were, since it goes to the allegedly stolen goods, we felt for the sake of judicial efficiency, we felt the matter should be brought before the Court at an early time and not delayed until again the Court said the trial schedule left a space on the calendar.

I would like to argue the motion.

Mr. Corcoran has had three weeks to respond to this motion.

THE COURT: Well --

MR. THAL: Let me say preliminarily, I have issued two subpoenas to two parties today. I know one of whom responded is in the courtroom with certain papers, and I can inquire of anyone from Schick Inc., the manufacturer of the goods, is in the courtroom, because if there's any questions left in your Honor's mind as to the validity of the statements either made in the affidavit or I will make, which I think can be read, I would like to be able to have your Honor examine anyone.

THE COURT: Is there anyone here from Schick? (Pause.)

No one answering.

You say this is not a renewal of the motion?

MR. THAL: No.

THE COURT: On the attacking the search on the grounds of insufficiency?

MR. THAL: A motion was never made.

THE COURT: I remember writing to -- is this garage on 44 something --

MR. CORCORAN: CBS Warehouse on 58th Street.

THE COURT: There was no written opinion. It was an oral opinion issued from the bench. I just wrote in that.

MR. THAL: In the original motion, your Honor, the FBI had come in and seized cartons and some papers, too.

THE COURT: I remember the activity. I remember.

MR. THAL: We focused our motion at the time on those papers, and a hearing was -- that was adjourned until the eve of trial.

THE COURT: Are you now making a motion to suppress on the grounds of insufficiency?

MR. THAL: Now, it's the cartons. The affidavit was read by the Court. We now understand that the cartons themselves were unlawfully seized.

THE COURT: Do you want to wait until the

Supreme Court passes on the rule? One of the questions becoming before --

MR. CORCORAN: Wall v. Wright, and also the associate generals, United States against Carthanthos which raises the same issue.

THE COURT: Are you familiar with the case?

MR. THAL: I am not, your Honor.

THE COURT: The State argued, or the Government argued, that once a magistrate issues a warrant, you can not attach the search, you can not object to the introduction of the evidence on the ground that the search was bad.

MR. THAL: That is not the state of the present law, your Honor.

THE COURT: Maybe next week.

MR. THAL: Well, I brought my motion on under the present law.

THE COURT: I see. But when is this case on?

MR. CORCORAN: The 29th.

MR. O'BRIEN: For trial, the 29th.

THE COURT: I can't ask the Supreme Court to act before this month. Go ahead.

MR. TAHL: May I refer your Honor -- I assume the papers are before your Honor -- to the affidavit in support of the search warrant, so critical, and look at the language. There are two prongs in the information in the affidavit. The first is, that the FBI received information from a truckdriver of a hijacking of Schick razors and toilet products on March 11, 1975. That's all. Schick razors and toilet products were hijacked.

We start with that. The second prong is that an informant whose veracity is testified to in the affidavit, which we don't really challenge at all.

We don't go into the validity of the informant. But, an informant saw at the premises of my client, CBS, several thousand cartons of Schick Super II bonded razors with spec number 02-40 on the cartons. That's the two prongs, and that's all that's in the affidavit. At first brush, we assume 02-40 was an identifying mark that one could trace to the truck to the cartons in question. It was determined that 02-40 -- I spoke with the counsel for Schick. He told me, and I have this in the affidavit, 02-40 means nothing more than the contents of those boxes are Schick Super II razors. You can't track down a shipment from that.

THE COURT: That certainly excludes every other manufacturer; doesn't it? Gilette, and

Wilkinson?

MR. THAL: No question, your Honor.

THE COURT: And it was a Schick truck that was hijacked, and they stole razors.

MR. THAL: It was an independent truck that was hijacked.

THE COURT: All right. But they stole Schick razors.

MR. THAL: And toilet products.

THE COURT: Are you saying they didn't find the toilet products there?

MR. THAL: I'm saying no way from the four corners of this affidavit could there be any causal connection. Your Honor, we are talking about common household products, and in the United States against Roth, this same circumstance existed here, it was held by the Court of Appeals, I believe it was the 7th Circuit in Roth, it held it totally invalid and insufficient, and where household products --

THE COURT: What is your name again?

MR. THAL: Thal.

THE COURT: Mr. Thal, if I found this affidavit is insufficient, I am going to adjourn the case and wait for the Supreme Court. If the

Government felt it was vital --

MR. THAL: We would ask for a ruling on the sufficiency of the affidavit and let the decision of the Supreme Court come down. Let the Government, if you wish to adjourn the case --

THE COURT: I don't wish to adjourn it. That's not the right statement. I wish to try the case.

MR. THAL: If no known circumstance, no contrary decision is brought down by the Supreme Court, then we would rely on the present state of law.

THE COURT: Only recently our Court of Appeals seemed to split on a matter, and I think it was on the exclusionary --

MR. CORCORAN: Carthano, Judge Mansfield.

THE COURT: I forgot whether the majority of the opinions said that the tendency is already or at the inclination is unmistakable, indicating that they believed that the Supreme Court was going to modify the exclusionary rule, and the other one, one of the other opinions saying well, it's not for us to change the ball game.

We will leave that to the Supreme Court.

Now, they may be guessing wrong, but the feeling is that there's going to be some modifications as to the exclusionary rule. It may not be done for months, because I don't think this was argued more than four weeks ago.

MR. CORCORAN: That's correct.

MR. THAL: We have a problem, your Honor.

MR. CORCORAN: But we may not have to even reach that. I may find the affidavit sufficient. It's only if I find it insufficient. I read Agular and Spinelli. That's how I start.

MR. THAL: That's not an Agular problem. It's not a question of the veracity of the informant. We will assume that he saw what he saw. All he saw, if I may use an analogy, your Honor, imagine if your Honor reported to the police this morning the theft of cartons of Wesses law books from your chambers. If an informant then then went to the police and reported a scene in my law offices, cartons of Wesses law books, marked for the sake of argument, U.S.C.A., this is sufficient probable cause to search my law office, and how many other law offices in this city and this country could be searched because Judge Mishler --

THE COURT: There's no sense spending time on it. Analogies are dangerous. All I can tell you is that lawyers usually don't have their books in cartons. They have them on shelves. So that if my cartons of books were stolen in cartons, and somebody saw your office and saw these very same volumes in cartons --

MR. THAL: Your Honor reported the theft of Wess's law books.

THE COURT: I thought you said in cartons.

MR. THAL: Yes. Let's go back to this. I meant to just illustrate this was a theft of razors, Schick razors, and toilet products. This is in every Macy's, Gimbels, every department store. I am sure there are hundreds of warehouses in this state, in this country, that contain Schick razor and toilet products.

The second portion is only that on another day --

THE COURT: I'll read your papers, but an argument on this is fruitless, because I'm going to have to read it very carefully.

I can show you close cases that give you hypotheticals, and it could go one way or the other. It sometimes goes just a statement that seems insignificant to you, that my opinion might make a difference.

MR. CORCORAN: Your Honor, may I respond to Mr. Thal's argument?

THE COURT: Well, just briefly.

MR. CORCORAN: I think Mr. Thal is erroneously stating his analysis of the papers here to the last two paragraphs. In fact, the Magistrate had before him the entire affidavit, as well as the search warrant itself. In both the opening paragraph of the affidavit and the warrant, which was being sought, the agents told the Magistrate that he had reason to believe that there were cartons bearing the name, "Schick" with a specific number 02-40 present in that warehouse, and that those cartons were taken from interstate commerce. The significant portions of the information and belief then is that the informant, whose reliability is conceded, saw several thousand cartons of Schick products bearing that specification now 02-40 the following day.

THE COURT: How many cartons were stolen?

MR. CORCORAN: Six thousand nine hundred ten products. Two thousand razors, 02-40. The specification number indicats a specific product of Schick, so we are not only limited here to Schick as opposed to Gilette, but a specific Schick razor.

THE COURT: What Mr. Thal is saying is too general. They're fungible goods. So, saying that they're Schick razors doesn't identify them as having been moved in this truck that was hijacked.

Actually, I think what would be more significant is the informant saying there was a thousand cartons.

MR. CORCORAN: Several thousand.

THE COURT: Several thousand. Don't you think that's unusual?

MR. THAL: No. And I think under Roth, several thousand cartons of Hamilton Beach products, General Electric products --

THE COURT: I'm emphasizing several thousand.

MR. THAL: Nothing unusual.

THE COURT: Nothing unusual in having several thousand cartons of razors first moving in a truck and then being found the next day in a warehouse?

MR. THAL: We do not know that they were there two days before.

THE COURT: I think what you mentioned, Mr. Thal, is what probable cause requires, not proof beyond a reasonable doubt, but that there's likelihood that that is the stolen merchandise.

MR. THAL: It can not be determined from this, your Honor.

THE COURT: I come back to what I said before.

MR. CORCORAN: Your Honor, in the Roth case, in which Mr. Thal so heavily relies, we had a very similar situation, and in that case, the affidavit had set forth that there was blenders, I believe it was Hamilton Beach blenders, an informant allegedly told the FBI agents that the Hamilton Beach blenders were seen in a warehouse, and had been stolen from interstate commerce shortly before that.

THE COURT: How far was the warehouse from the theft?

MR. CORCORAN: The theft --

MR. THAL: Was in New Jersey.

MR. CORCORAN: Parsippany, New Jersey.

MR. THAL: And the warehouse is in Brooklyn.

MR. CORCORAN: The Court said that since in this case the only thing they believe was the agent. They discounted the informant's testimony completely, because there had been a misstatement. The Court found that that might be insufficient, because there are many kinds of products. They said, had he specified Hamilton Beach blenders they would have found it sufficient. But the 02-40 Schick products, which is a bonded blade, was found the day after the hijacking in a quantity of several thousand cartons. Under Roth, that would have been sufficient to say in the warrant --

THE COURT: Yes, you can argue all day. It won't convince me one way or the other.

MR. O'BRIEN: Your Honor, I'm just here to join in the motions of Mr. Thal on behalf of all the other defendants.

MR. THAL: Your Honor, one technical matter, I was prepared, since your Honor will be reading the papers after this presentation, I was prepared to put on evidentiary material to support statements made in my affidavit.

Now, obviously, I wouldn't want the Court to read hearsay from Mr. Thal or I have Mr. Thal's statement and nothing else --

MR. CORCORAN: Your Honor, the Government will concede that 02-40 is a specification in which indicates a product and not an identification number. That is the basis of Mr. Thal's application, and we have no argument with that.

THE COURT: I don't know that any bonded manual has an identifying number on it.

MR. THAL: The cartons could be identified.

I assume, in other words, there are things -- if I may, your Honor --

MR. CORCORAN: Your Honor, with regard to the motions to the defendants, the possession is close on the ground of standing. This is a conspiracy to possess. There's no allegation by Mr. Santa or Mr. Malone that we had any possession interest or propriety in the products. They had no connection with the warehouse.

MR. O'BRIEN: Your Honor, I would await your decision on the initial motion before arguing the standing.

THE COURT: I just as soon --

MR. CORCORAN: Your Honor, may I have a week to submit the papers?

THE COURT: You are supposed to go to trial on the 29th.

MR. CORCORAN: That's right. Contrary to Mr. Thal's statement, I received these on March 5. I, myself, have a trial for Monday, and preparation for those two trials as well as one on the 29th didn't permit exclusion --

THE COURT: I will take your argument under consideration. If I think the question is close, I want to hear it from you.

MR. O'BRIEN: Your Honor, I would not be opposed to an adjournment if that's in the best interest of my client.

THE COURT: I have been moving a lot of trial days up, and you will get one, only if the trial goes over, and might I say, I don't expect this to happen. I think this case will go to trial. You say this was on from March 29?

MR. O'BRIEN: Yes, your Honor.

MR. THAL: Yes, your Honor.

THE COURT: My God, I have two cases on Monday.

MR. O'BRIEN: Your Honor, again I would have no objection against adjourning this case. I have spoken with Mr. Coiro. It seems he may have a problem on the 29th, and that he is starting a trial, and I have spoken with the other defense counsel, and he also said he would not be opposed to an adjournment.

THE COURT: As a matter of fact, I'm likely to advance this to the 22nd.

MR. CORCORAN: Your Honor, I will be getting another trial the 22nd before Judge Neaher.

THE COURT: I have two trials on the 22nd.

MR. O'BRIEN: Your Honor, I have a case on on the 22nd.

THE COURT: I'm trying to advance the other one. We are waiting to hear from Mr. Ketchum. You expect to go to trial on the 29th here, and I will decide this just as soon as I can.

MR. O'BRIEN: Thank you, your Honor.

MR. THAL: Your Honor, I have again one comment unrelated to this. There is a witness in this court who has information which I think is extremely useful to my client. He was also the owner, apparently, of another warehouse.

THE COURT: What's his name?

MR. THAL: Mr. Friedman.

THE COURT: Mr. Friedman, will you come forward, please. Will you please identify yourself for the record.

MR. FRIEDMAN: Eugene Friedman. I live 4718 17th Avenue in Brooklyn.

THE COURT: Mr. Friedman, you are the owner of what warehouse?

MR. FRIEDMAN: I am president of S & S Warehouse.

MR. THAL: Which is another warehouse which the Government alleges had these goods on the premises.

MR. CORCORAN: There's been no such allegation.

THE COURT: Did you subpoena Mr. Friedman?

MR. THAL: I did. I understood what the Government's allegation was, that they at least found some goods that were part of the alleged stolen load.

MR. CORCORAN: That's correct. The presence of those goods is unrelated to this case. There have been no allegations in this matter with regard to S & S Warehouse.

MR. THAL: That's correct. I wanted to explore with Mr. Friedman --

THE COURT: Are you willing to talk to a lawyer?

MR. THAL: If I may, he's been very concerned and that's why I asked to raise this to the Court. He was speaking with me and showing me copies of receipts of seizure issued by the FBI to him. He was showing me copies which in some way incriminate him. He's afraid of the Government, and the FBI, and I would like the Court to explain to him, although he's free to speak to me, he has a duty as a citizen to come forward with evidence at the proper time and to produce such evidence when requested.

THE COURT: Did you want to talk to me, Mr. Thal privately or not? This is strictly up to you. I can advise you that the Government doesn't own any witness. The Government can not tell any witness not to talk to a lawyer. But, whether or not a witness wants to talk to a lawyer is strictly up to him.

Now, you have certain records with you. The lawyer has no right to see them. No absolute right to see them unless pursuant to a subpoena, and at the trial for some evidentiary purpose. He can put you on the witness stand and ask you if you brought the records. There is nothing wrong with showing him before, because he may find they're irrelevant, and have nothing to do with the case.

Mr. Thal said something about you having a fear of incriminating yourself.

Well, only the individual knows, and sometimes he doesn't know, whether he committed a crime or not.

I am not telling you to turn it over to Mr. Thal. If, among those records, there was something that wasn't incriminating, Mr. Thal would have the right and probably the duty -- he's not your lawyer -- of turning over to the Government for prosecution.

So, if there is a question in your mind, I would consult a lawyer.

MR. THAL: He had an attorney here. The issue was not incriminating fear of anything wrong. He was just afraid if he spoke to me or cooperated with me he would be on some kind of a bad list by the FBI.

THE COURT: Don't worry about any threat of the FBI or anyone else in the Government of taking any kind of revenge against you because you were helping the other side.

Mr. Corcoran will probably give you that same assurance.

MR. CORCORAN: That's correct. Nor is Mr. Friedman a Government witness at this point. I wasn't going to call you.

THE COURT: Even if the Government thought you were an important witness, they have no right to say to you, "Don't talk to the other side. We don't like it," and I know there would be no insinuation of any threat if you did speak to the other side.

But, if there was, you just come back to me and tell me that some Government official said that they didn't like you talking to the other side, and now, as I indicated, it's wrong, it's improper. This is a courtroom. The lawyers should have access to anybody, including witnesses, for the Government.

Now, on the other hand, since you have a perfect right not to talk to anybody, nobody can make you talk. They will put you on the witness stand, swear you in, and ask you questions. That's the way it's done. All right.

MR. THAL: Thank you very much.

THE COURT: Good enough.

(Whereupon these proceedings were concluded.)

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----------------------------------x
UNITED STATES OF AMERICA
:
-against- 75 CR 762
:
MANUEL V. GOMEZ, STANLEY DIAMOND, VINCENT SANTA, FRANK JOSEPH MALONEY, CHIAM KAHAN, SOLOMON WERCBERGER and MOR WERCBERGER, : Memorandum of Decision and Order
:
Defendants. July 6, 1976
-----------------------------------x

MISHLER, CH. J.

Defendants Chiam Kahan, Solomon Wercberger and Mor Wercberger move pursuant to F.R.Crim.P. 41(f) to suppress certain evidence seized, pursuant to a search warrant on March 13, 1975, on the ground that the supporting affidavit fails to show probable cause. The affidavit of Patrick Colgan, special agent of the Federal Bureau of Investigation, states that he was advised that a truck carrying 6,910 cartons of Schick razors and toilet products was hijacked on March 11, 1975. A reliable informant advised Agent Colgan that he was at the CBS warehouse located at the foot of 50th Street in Brooklyn, New York on March 12, 1975, and "observed several thousand cartons of Schnick [sic] super two-bonded razors, bearing the Schnick [sic] Inc., Spec No. 02-40 on the cartons." The supporting affidavit claims, and the government concedes, that the designation "Spec No. 02-40" is not an inventory number identifying the goods, but, instead, the manufacturer's code number designating the type of goods packaged in the carton (i.e., Schick II razors and blades). Briefly, defendants' argument is that the information that thousands of cartons of Schick razors and blades were seen in a warehouse on March 12, 1975 is not a sufficient basis for the reasonable belief that they were part of the same load of 6,910 cartons of Schick razors, blades, and toilet products hijacked the day before. 1/

Neither the reliability of the informant nor the reliability of the supplied information is challenged. See Aguilar v. State of Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964), Spinelli v. United States, 392 U.S. 410, 89 S.Ct. 584 (1969). The question presented on this motion is whether the underlying facts in the affidavit (the hijacking of a truck containing thousands of cartons of Schick razors and toilet products on March 11, 1975, and the presence of several thousand of Schick razors at the warehouse searched on March 12, 1975), assuming them to be true, were sufficient to draw a reasonable inference that the razors at the warehouse were part of the hijacked load. Vitali v. United States, 383 F.2d 121 (1st Cir. 1967).

Affidavits supporting search warrants are to be tested and interpreted in a common sense and realistic manner. United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741 (1965). The facts and circumstances must do more than arouse a suspicion that contraband is on the premises, but it need not rise to the level of proof necessary to convict. Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302 (1949). The issue is whether the goods seen by the informant were likely to be the goods stolen the previous day.

Defendant argues that these products are so common that they "could be observed in hundreds of thousands of places throughout the United States on that same day." (Affidavit by Steven Thal, p. 5). While possible, it is unlikely that many places would have thousands of cartons of Schick razors on hand. The affidavit established that the quantity of razors observed at the warehouse on the day following the hijacking was extraordinary.

The court finds that the affidavit sufficiently demonstrated probable cause to believe that the cartons of

Schick razors at the CBS warehouse were part of the load hijacked on March 11, 1975.

The motion to suppress is denied, and it is

SO ORDERED.

U. S. D. J.

NOTE

1/ The affidavit states that the goods "were being shipped from Schnick [sic], Inc., West Haven, Conn. to Anahiem, California."

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :
:
-against-
: 75-CR-762
MANUEL V. GOMEZ, VINCENT
SANTA, FRANK JOSEPH MALONEY, :
CHIAM KAHAN, SOLOMON
WERCBERGER, MOR WERCBERGER, :

Defendants. :

---------------------------------x

United States Courthouse
Brooklyn, New York

January 17, 1977
10:00 o'clock A.M.

Before:

HONORABLE JACOB MISHLER, Chief U.S.D.J.

CHERYL FREY
ACTING OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: PAUL CORCORAN, ESQ.
Assistant U.S. Attorney

SALVATORE QUAGLIATA, ESQ.
Attorney for Defendant Gomez

STEPHEN MURPHY, ESQ.
Attorney for Defendant Santa

THOMAS O'BRIEN, ESQ.
Attorney for Defendant Maloney

HARRY E. YOUTH, ESQ.
Attorney for Defendants Kahan, S. Wercberger and M. Wercberger

STEVEN THAL, ESQ.

(Jury selection.)

THE COURT: I understand that this is the first day of service in this court. We are about to pick a jury in the case of the United States of America v. Chiam Kahan, Solomon Wercberger and Mor Wercberger.

The defendants are sitting at counsel table. They are represented by Harry E. Youtt who is standing. Suppose you stand, Mr. Chiam Kahan, and you, Mr. Solomon Wercberger and Mr. Mor Wercberger? And the Government is represented by Assistant United States Attorney Paul Corcoran. The United States Attorney for this District is David G. Trager.

Do any of you know any of the defendants or respective counsel?

MR. YOUTT: My partner is sitting with me also. Mr. Steven Thal.

MR. CORCORAN: Your Honor, the gentleman to my right is the FBI agent, Lester Colgan.

(A jury is duly sworn and empanelled by the Clerk of the Court.)

THE COURT: I would like to ask once more how many of the jurors chosen have sat on a jury before, civil or criminal, state or federal? So one member of the regular jury and an alternate. This is all we are going to do today. I have a matter tomorrow morning and I won't be able to reach this case until one o'clock tomorrow. But I think that we can spend a few moments and I will tell you something about what a trial is and try to destroy the illusion you might get from watching television.

A trial has definite formal steps and procedures. As I say, the lawyers have a certain function, the jury has a separate function, and I have a distinct function. And we all should understand each other's function. The lawyers have an obligation to protect clients' rights. They may object at times that calls for a ruling by the Court. Don't decide this case on how many times a lawyer objects or does not object. You must understand he is only doing his job.

The first step in the trial is for the lawyers to open to the jury. The lawyers address you. The Government will tell you what his position is, who its witnesses are going to be and how it intends to prove its case. The defendant has a right, if they wish, to tell what their position is. The defendant, as I told you, has no obligation to produce any evidence. The defendant can rely on the failure of the Government to prove guilt beyond a reasonable doubt. And the defendant has a choice of making a statement or not.

The Government calls its first witness and that examination is called a direct examination. After that, the defendant has the right to cross-examine that witness. And then the Government, if it wishes, can ask further questions called redirect. And then the defendant can ask further questions called a recross. And after the Government finishes its case, the defendant, if he wishes, as I said, can offer proof or rely on the failure of the Government to prove his guilt.

When all the evidentiary part of the case is over, the lawyers address you again. Mr. Corcoran will sum up and then Mr. Youtt will sum up and then Mr. Corcoran gets another chance to sum up which is called the rebuttal summation. When all that is done, then I will charge you on the applicable law.

After that, you will go into your jury room and deliberate on the matter considering the evidence in the light of the law, as I charge it. That is the first time you have the right to discuss the evidence. Until that time you should not talk about this case with anybody, not at home and not here.

The average or usual trial day is ten o'clock to about five or five thirty. As I said, we're suspending early today because I happen to have a Judge's meeting and we are starting late tomorrow because I have other business. Now we cannot start the trial until everyone is here. That means lawyers, litigants, the Judge and the jury. If one juror is late, we must wait. So I ask you all to get here in time. In time means that you register first downstairs about 9:30 or twenty of ten. As soon as you are through registering downstairs you come to the jury room adjoining the courtroom.

I usually start my trials at the time scheduled. Tomorrow, of course, I may not get into the courthouse until possibly 12:30 or twenty of one. And then tomorrow we will probably go until about 5:30. The jury is excused. I will ask my courtroom deputy to show you where the jury room is so that you can learn how to exit the courthouse from the interior halls of the courthouse. The jury is excused. Don't forget everyone should be here. Please be here on time and we will start promptly at one o'clock.

(Jury leaves courtroom.)

THE COURT: Until this moment you were reluctant to reveal what the information was concerning some alleged erroneous statement made to the Magistrate in the affidavit.

MR. CORCORAN: That is correct.

THE COURT: Are you prepared for it now?

MR. CORCORAN: Yes, I am. Without identifying anyone at this time, for the benefit of the defense counsel, indicated at this time in reviewing the evidence and preparing witnesses for this trial, certain discrepancies have come to my attention which I don't believe are deliberate but which I think in all fairness should be brought to the defendants' attention and the Court's attention.

The first discrepancy appears in paragraph 2 of the affidavit.

THE COURT: Wait until I get the affidavit. Is that Patrick Collins' affidavit?

MR. CORCORAN: That is correct.

THE COURT: Paragraph 2 --

MR. CORCORAN: Paragraph 2 relates to the reliable confidential informants. I believe, well, first of all, that discrepancy appears in the fifth line. It is indicated $75,000 worth of stolen merchandise had been recovered. Based upon the information of this informant, it appears that that may not have been correct. The informant was responsible for the arrest of one individual with regard to the $75,000 theft. But there was no recovery of those particular goods. There was recovery of the $25,000 worth of goods indicated two lines below and also the arrest of two individuals with regard to that recovery. So that the discrepancy of paragraph 2 relates to the $75,000 recovery. There were in fact three arrests.

THE COURT: Now wait a minute. You read that statement as saying that $75,000 worth of stolen merchandise was recovered.

MR. CORCORAN: There was not a $75,000 recovery.

THE COURT: I don't think it says that. It says resulted in the arrest of one individual for the theft of approximately $75,000 of stolen merchandise.

MR. CORCORAN: That would be correct, not the recovery.

THE COURT: Go ahead.

MR. CORCORAN: On the same paragraph towards the bottom it indicates that the information was based upon observations of the informant while in the CBS warehouse on March 12th, 1975. It appears in reviewing the evidence and discussing the events with the witnesses, that the informant may not have been in that warehouse on March 12, 1975. That is, he cannot recall being in that warehouse on March 12, 1975

The information which was conveyed to the Magistrate, which was believed to be correct by the agent who swore out the affidavit, Agent Colgan, in fact the agent who supplied him with the information, believed it to be correct, but the informant indicated to his agent that he had participated in the unloading of the time -- D.C. Trucking on March 12, 197 and that two rental trucks had been loaded. That the two rental trucks had then been taken to the CBS warehouse and the S&F Warehouse where thousands of cartons of shipped products were loaded into each. And he did give the agency a specification number 0240 as being a specification number that he observed on some of the cartons.

However, it appears that either he cannot recall being in the CBS warehouse, and at this time his testimony would be that he was in the S&F while some of his colleagues were loading on the CBS warehouse on March 12th. He did return to the CBS warehouse on May 13th and did unload a third truck of shipped products from the same D.C. truck into the CBS warehouse under observation of FBI agents. And before they obtained and executed these search warrants.

However, the statement that he was in the warehouse on March 12, 1975 may not be correct. He may have only been in the S&F warehouse on the 12th.

THE COURT: But he was in the CBS warehouse on the 13th?

MR. CORCORAN: Yes, on the 13th. He knew the goods to be going into the warehouse.

THE COURT: There again, maybe you are reading something into it. There is a period after March 12th.

MR. CORCORAN: That is correct.

THE COURT: He was in the above premises known as CBS warehouse on March 12, 1975. So that might be March 13th?

MR. CORCORAN: That is correct.

THE COURT: But the next paragraph when he says he observed it, he does not say it was on the 12th

MR. CORCORAN: Well, it says while on the above-described warehouse.

THE COURT: It does not say that date.

MR. CORCORAN: Correct. I just didn't want to mislead the Court. It could be indicated that he made that observation on the 12th.

THE COURT: Is that the whole thing you were worried about?

MR. CORCORAN: That is correct.

THE COURT: Have you got any comment on that, Mr. Youtt?

MR. YOUTT: As far as comments are concerned, I am trying to digest exactly what the difference is, how they have an impact here. But it clearly appears that the reference [redacted] is to March 12th in the affidavit. Now I don't know what the timing was in terms of obtaining the affidavit on March 13th. But it was obtained on March 13th. It would seem to me that if it was obtained prior to the time that this person was there on the 13th, that he would have been available to say so and he was not. And I certainly would like to have a hearing on the issue of where he was and the timing and also how that affects the particular validity of this particular affidavit.

THE COURT: I don't know that I would require for the informant to be here. If you wanted a hearing, I would require the FBI agent to get the information and testify as to what information he got and how he put it in. Because when an affidavit in support of a search warrant is attacked, what the Court must look for is to see whether a fraud was actually committed on the issue in court. Not whether every statement, every punctuation mark, every comma was correct.

MR. YOUTT: I would submit, your Honor, that the task is not whether a fraud was committed. The issue in court is certainly if that happened it would be a matter of suppression. However, I would submit that with respect to material statements affecting an affidavit, the task is whether or not there was a standard of culpability that was breached. Now, in varying circuits that standard is different. In this circuit, so far as the latest case I can see, it appears that that standard is a negligence standard, possibly verging upon gross negligence or recklessness. The test being whether or not the agent at the time had the means available to obtain the correct information so that his obtaining the incorrect information cannot be excused by a court review --

THE COURT: He was the one that signed the affidavit. And it is his performance that is in question.

MR. YOUTT: On that particular issue there is some authority to the proposition that when the question arises, the actual witnesses should be produced. I am referring specifically to the case of Petillo v. New Jersey at 400 F. Supp. 1152. The case decided in September of 1975.

THE COURT: Who is the Judge?

MR. YOUTT: Judge Stern, Herbert Stern. There, the Court held that when a credibility issue such as this is raised where an issue of culpability is raised and it involves the reliability of an informant or statements made by an informant, theretofore undisclosed, the Court can and should order the disclosure of the informant or the production of the informant for purposes of a hearing on that particular issue. That particular matter was considered at page 1167, a fairly lengthy hearing. Considered in light of the old Supreme Court case of Riviero v. United States 353 --

THE COURT: Which has nothing whatever to do with obtaining a search warrant.

MR. YOUTT: It does not, that is correct. It has to do with the question of when the identity of an informant should be disclosed, leaving that matter to the discretion of the Court. Judge Stern ruled in those circumstances the identity ought to be disclosed in order that the proper context of the affidavit would promptly be --

THE COURT: I don't know what the facts are in the case before Judge Stern. But I don't feel bound by Judge Stern's determination. If the Government wishes to offer the agent, and I find that the error is immaterial and made in good faith, I should not direct the presence of the informant. If Mr. Corcoran wants to present him, that is up to him. But I think there is an overriding reason in many cases for keeping the identity of the informant secret. And I think something better than what is disclosed here or what Mr. Corcoran represents there to be here, there has to be more than that before I would require the informant to be produced.

MR. CORCORAN: I don't believe it is the materiality of the error, but rather the deliberateness of it. As long as the warrant on its face is sufficient and the Magistrate acted upon sufficient evidence, I think an error which was not deliberate, material or otherwise, was not ground for suppression.

THE COURT: I will come to that, if I have to. I cannot understand why a deliberate, unimportant immaterial error should affect a search. However, I will hear the testimony on whether or not it was deliberate and I will rule on whether or not it is material.

MR. CORCORAN: I agree with your Honor. I don't believe it wasmaterial --

THE COURT: I thought you were saying the opposite --

MR. CORCORAN: Even if it is material, unless it was deliberate, it is not --

THE COURT: I quite agree.

MR. YOUTT: I have had a chance to at least research this question, but not a chance to prepare a brief on it. I do have case citations I can provide, if the Court wishes.

THE COURT: Let's have the hearing. Bring the agent, Mr. Colgan, in. Bring him in tomorrow morning at 10:00 o'clock and see what he has to say. And then we will determine whether your citation is material. I have ruled on this any number of times.

MR. YOUTT: I can't provide them now.

THE COURT: There is hardly an affidavit that a defendant's lawyer cannot attack for one reason or another. They are drawn in a hurry, errors are made, and a search is not overturned just because the agent said the 12th when he should have said the 13th where it does not matter. The question is whether he saw the cartons. So whether he saw them on the 12th or the 13th, as long as it is before the affidavit is drawn, I cannot see the materiality of that.

MR. YOUTT: I take it, your Honor, you will rule on that after the hearing tomorrow?

THE COURT: Yes, I will wait for the hearing. But what I am saying is I would not count too heavily on an error of that type for an upturned search.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :
:
-against- : 75-CR-762
:
CHAIM KAHAN, SOLOMON
WERCBERGER, MOR WERCBERGER, :

Defendants. :

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United States Courthouse
Brooklyn, New York

January 18, 1977
10:00 o'clock A.M.

Before:

HONORABLE JACOB MISHLER, Chief U.S.D.J.

PAUL KLIMASZEWSKI
ACTING OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: PAUL CORCORAN, ESQ.
Assistant U.S. Attorney

HARRY E. YOUTT, ESQ.
Attorney for Defendants

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THE COURT: Cause on trial, United States against Kahan, Wercberger and Wercberger. We're ready to proceed.

MR. CORCORAN: Good morning, your Honor.

MR. YOUTT: Your Honor, may I just have a minute with my client to discuss a matter that recently has come up?

THE COURT: Sure.

MR. YOUTT: Thank you, your Honor.

MR. CORCORAN: At this time, your Honor, the Government calls Patrick Colgan.

PATRICK COLGAN, called as a witness, having first been duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: Please state your name and spell it for the record.

THE WITNESS: Patrick S. Colgan, C-O-L-G-A-N, Jr.

DIRECT EXAMINATION

BY MR. CORCORAN:

Q Mr. Colgan, by whom are you employed?

A By the Federal Bureau of Investigation.

Q How long have you been so employed?

A Seven years now.

Q In what capacity?

A I'm a special agent with them.

Q Have you been assigned to any particular squad?

A Yes, I am.

Q What squad is that?

A I'm on the squad that specifically handles truck hijackings, truck theft and major warehouse burglaries.

Q Do you have any particular title with that squad at the present time?

A Yes, I do. I am what is known on this squad as the relief supervisor and his street coordinator, which means I'm responsible for coordinating activities while out on the street.

Q Calling your attention to March 13, 1975, were you working that day?

A Yes, I was.

Q Were you, in fact, here in the Eastern District of New York?

A Yes, I was.

Q The U.S. Attorney's Office?

A Yes, I was.

Q Approximately what time did you arrive there?

A I was -- in the morning that I arrived here at the Eastern District, perhaps between 10:00 and 10:30.

Q Can you tell us what occurred that day while you were here at Eastern District?

A I was here on a matter that at this time I cannot recall, the particular case or the particular U.S. Attorney I was here to see.

While I was here my office was able to contact me by telephone and advised that since I was in the Eastern District of New York on business, would I please stand by a phone due to the fact that there was an investigation and information currently being received by our office regarding a recent hijacking of Schick Products that had occurred in New Jersey. I was familiar with that particular case when I got the phone call.

Q And did you indicate that you would stand by a particular phone?

A Yes. They had a number that they contact me on.

Q And were yousubsequently contacted?

A Yes, I was.

Q By whom were you contacted?

A I was contacted by two agents, Agent Dowd and Pecoraro, both of whom work on my squad and with me.

Q Do you recall what time you were contacted?

A It was around lunchtime, I would say between quarter of twelve and twelve thirty.

Q As a result of that phone call, did you obtain a search warrant?

A Yes, I did.

Q And did you swear out an affidavit for that search warrant?

A Yes, I did.

MR. CORCORAN: Can we mark these 1 and 1-A for purposes of this hearing?

THE CLERK: Affidavit marked Government's Exhibit 1 under search warrant and 1-A for identification in the hearing.

Q I show you Government's Exhibit 1 and 1-A and ask you: if you can identify those documents, Agent Colgan?

A Yes, I can. Government Exhibit 1 is the affidavit which I swore to to obtain the search warrant for CBS Warehouse in Brooklyn and Government's Exhibit 1-A is the actual copy of this search warrant.

Q Now prior to swearing out this affidavit, that was sworn out before the Magistrate, was it not?

A That's correct.

Q What information, if any, did you receive from your fellow agents?

A Via telephone from both agents Dowd and Pecoraro I received the following information; for the purposes of the Court, the reason there are two agents involved in the transmission of communications, is that one agent, Agent Dowd, was responsible for the case, he was the case agent and Agent Pecoraro in this matter had a confidential source, and both agents supplied information to me regarding their specific knowledge.

Q What information did Agent Pecoraro advise you of?

A Agent Pecoraro is the agent with the confidential source, informed me that he had heard from his source the night before, as well as early on the morning of the 13th of March, that this confidential source had unloaded a trailer-load of Schick Products that he knew had been stolen in New Jersey.

THE COURT: What time were you getting this information on the 13th?

THE WITNESS: Again, your Honor, between quarter to twelve and twelve thirty.

Q Are you certain of the time?

A No, I'm not certain of the time. I know that I was here in the Eastern District earlier thatday, which would have meant around 10:00 o'clock, and then subsequently I was contacted by my office, advised to remain near a phone and was contacted by these two agents.

THE COURT: Were you told at what time the agent got the information from the confidential informer?

THE WITNESS: I was told by that agent, Agent Pecoraro, that he had gotten that information partially the night before, the night of the 12th, and partially earlier the morning of the 13th, around 8:00 o'clock I believe he told me, 8:00 o'clock in the morning.

Q And did Agent Pecoraro give you information with regard to reliability of the informant?

A Yes, he did.

Q What did he advise you?

A Agent Pecoraro advised me that this informant had been responsible for one arrest and information on a $75,000 load of stolen goods, and further showed his reliability and credibility by saying this same informant was responsible for two arrests in the recovery of $25,000 worth of other stolen goods.

Q Was that essentially the extent of the information you received from Agent Pecoraro?

A Regarding the credibility and reliability of the informant, yes.

The conversation with Agent Pecoraro also included the information he had obtained from his confidential

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Colgan-direct

source, regarding knowledge of the stolen Schick Products.

Q Were you personally familiar with the theft of the Schick truck at the time?

A Yes, I was aware that there had been communication received by my office from both New Haven and New York regarding the hijacking of a tractor trailer load belonging to Time DC and containing Schick Products.

Q What information did Agent Pecoraro supply you with that morning, that afternoon, concerning the information he had received from his confidential source?

A According to Agent Pecoraro, the confidential source supplied him with the information that he, the source, had helped unload the stolen Time DC trailer containing the Schick Products on a day also before March 13th. This informant also advised thathe helped load a number of rental trucks with the Schick Products, and that these rental trucks went to two separate Brooklyn warehouses.

The informant advised, according to Agent Pecoraro, that one warehouse was called S & F Warehouse in the Brooklyn Navy Yard and the other warehouse was CBS Warehouse, 50th Street and 1st Avenue in Brooklyn. Further, the informant advised that he had delivered on March 12th, a shipment that did go to the CBS Warehouse, and also supplied one identifying number of Schick Products as 0240 as being on

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the cartons, a large number of the cartons delivered to CBS.

Q Was this information you obtained from Agent Pecoraro or Agent Dowd?

A This particular information from Agent Pecoraro, regarding the reliability of the informant and the information that he had, the informant supplied.

Q You said you also spoke with Agent Dowd in connection with obtaining the warrant?

A That's correct.

Q What information did you receive from Agent Dowd?

A From Agent Dowd, I asked the background on the actual hijacking, although I was familiar with it, I wanted more substantial facts, such as the exact date, approximate time and exact location, which Agent Dowd did give me.

I also asked Agent Dowd if the number 0240 as supplied by Agent Pecoraro, from the informant was significant to your stolen load, at which time Agent Dowd told me it was a number of a product that was on the stolen trailer, but he did not know, Agent Dowd, did not know specifically if that particular number was significant to that stolen shipment.

Q What, if anything, did you do at that point?

A The conversations with both agents were terminated and I subsequently called my New Haven, Connecticut office in an attempt to obtain the case agent in that office, supply him with the identifying number that we had just obtained from a confidential source to see if that agent could contact the victim company at that point to determine if that number was definitely significant to the shipment.

Q Did you receive a return call from your New Haven office?

A Yes, I did, and at that time I was informed that that number was definitely part of the shipment of Schick Products that had been hijacked inNew Jersey.

Q As a result of the information you gathered then from both sources, did you swear out the warrant marked Government's Exhibit 1?

A Yes, I did.

Q Would you read this warrant, Agent Colgan?

A To myself?

Q Yes, please. I'm sorry, would you read the affidavit, Government's Exhibit 1.

MR. CORCORAN: This is to be marked 2, 2-A, B, C, D and E.

Q Have you completed reading the affidavit?

A Yes, Ihave, Mr. Corcoran.

Q And you read that affidavit on the 13th of

March 1975, did you not?

A Yes, I did.

Q Does that affidavit contain the information that you conveyed to the Magistrate on the 13th of March 1975?

A Yes, it does.

Q And was that information true and correct to your knowledge on the 13th of March 1975?

A Yes.

Q After obtaining the warrant, what did you do?

A After the warrant was signed and I physically had a copy of it in my hand, two copies, I proceeded to CBS Warehouse in Brooklyn.

Q Did you proceed there directly from the Magistrate's office?

A Yes, I did.

Q Approximately how far was the CBS Warehouse from the U.S. Courthouse here in Brooklyn?

A I'd say approximately three miles.

Q And what time did you arrive at CBS Warehouse?

A Approximately 4:00 o'clock, five after four.

Q How long did it take you to get from the U.S. Courthouse to the CBS Warehouse?

A About ten minutes.

Q Approximately what time did the Magistrate sign the warrant which was based upon this affidavit?

A Three thirty, quarter to four.

Q About three thirty or quarter to four you presented the affidavit in question?

A That's correct.

Q You said you took the affidavit to CBS yourself?

A Yes, I did.

Q And did you participate in the execution of that search warrant?

A I really don't recall if I took the affidavit.

Q I mean took the warrant?

A Yes.

Q I'm sorry. You participated in the execution of the search warrant?

A Yes, I did.

Q Could you describe the premises of CBS Warehouse at 50th Street and 1st Avenue in Brooklyn?

A Yes, I can. It's a multi-story building, perhaps five stories high, extremely large structure. Right in the center, I would guess would be an elevator shaft as part of the building. It had "CBS Warehouse, Building No. 53."

THE CLERK: Six documents marked Government's Exhibit 2 through 2-E, inclusive, for identification and one document marked Government's Exhibit 3 for identification.

Q Did you execute this warrant yourself, Agent Colgan?

A Not myself, no.

Q Are there other agents involved?

A Yes, there was.

Q Who else was on the premises when you arrived?

A To the best of my recollection, Agent Dowd, Agent Pecoraro, Good, Gilcherson, Hines, Gallagher and --

Q When I say "on the premises", they had entered CBS Warehouse when you arrived?

A No, but they were near the premises of CBS Warehouse when I arrived.

Q Did you enter the warehouse immediately after arriving?

A Not immediately but very shortly thereafter, within 15 minutes after my arrival.

Q What happened when you entered the building?

A We first entered the ground floor platform area to get near any entrance into the building, you must first go up a few steps onto a large platform-type area where deliveries are initially received.

I believe at that point we encountered one of the employees of CBS Warehouse who was familiar with me, by the name of Mr. Fisher. Mr. Fisher remembered me from being there shortly before on anothermatter and I informed him we again wished to talk to the people who were responsible for the corporation, and specifically asked for Moish Wercberger and Mr. Kahan.

Q You had been out to CBS before March 13, 1975; is that correct?

A That's correct.

Q When had you previously been on the premises?

A I was on the premises on February 5th of the same year, 1975, approximately four to five weeks prior.

Q And for what purpose had you been there at that time?

A At that time I was there to obtain a consent search of that premises, due to the fact we had information that stolen goods were located there.

Q And did you, in fact, locate stolen goods at the CBS Warehouse on February 5th or February 4th?

A February 5th, yes. I spoke that day to three corporate officers, two Mr. Wercbergers and Mr. Kahan, and all three told me that they were responsible for the activities of the corporation, and all three consented to a search of the premises, after I had informed them we were looking for Anacin and other Whitehall Pharmaceutical Products that we had information were contained therein.

Q And you, in fact, located the products in the CBS Warehouse on February 5th; is that correct?

A Yes, they were there, and they were seized.

Q Returning now to March 13th, your second visit to CBS Warehouse; what occurred after you met with Mr. Fisher?

A Mr. Fisher called upstairs via an interoffice type communication system and informed someone upstairs, I don't know who, that the FBI was downstairs and wished to come up and that they had a search warrant.

There is, to my knowledge, no stairway that we were familiar with so we had to wait for an elevator which took some time, anywhere from five to ten minutes, and in fact I remember being quite annoyed at the fact that we had to stand down there that long, and we did subsequently go up to the office area, I believe it was the fourth floor,where we encountered both Mr. Mor Wercberger and Mr. Kahan.

Q Who did you encounter first, Mr. Kahan?

A I believe they were both there at the same time when we stepped off the elevator.

Q Do you see those individuals here in the courtroom today?

A Yes. The individual I know as Moish Wercberger is on the Judge's left at the defense counsel and Mr. Kahan is immediately to his right.

THE COURT: What is the correct name; will you stand, and point to whom you identified?

THE WITNESS: Yes. Moishe Wercberger and Chiam Kahan.

Q Is he known as Mor Wercberger?

A Yes.

Q Did you have any conversations with Chiam Kahan and Mor Wercberger at that time?

A At thattime, at that immediate time no, we did not. We presented the search warrant, I presented the search warrant and we proceeded to look for stolen Schick Products.

Part of the load was directly in front of us as we stepped off the elevator.

MR. CORCORAN: We have a series of photographs marked as Government's Exhibit 4 for the purposes of this hearing.

THE COURT: Carry the numbers over to the trial and we'll use them and treat them as the same numbering.

MR. CORCORAN: The difficulty is that, your Honor, I would prefer to present at the trial exhibit numbers in numerical order to present to the jury, first with Exhibit 2 it would be difficult if the jury wouldn't have seen the affidavit and search warrant which were marked Exhibits 1 and 1-A.

THE COURT: All right, there are many exhibits marked at trial that the jury doesn't see.

MR. CORCORAN: I think they begin to wonder what they're missing.

THE COURT: What happens when something is marked for identification and doesn't get into evidence, they don't see it.

THE CLERK: Nine photographs marked Government Exhibit 4 for identification.

Q Agent Colgan, looking at photographs marked Government's Exhibit 4, can you identify those, that which is depicted in those photographs?

A Yes, I can. These are photographs of the Schick load as was found in CBS Warehouse the day we entered with the search warrant.

These photographs are taken from different portions of the large storage area, and part of the pictures, although I can't be specific which ones, were part of the load we first observed when we stepped off the elevator.

Q Having found the Schick Products you were looking for -- strike that. Were you able to identify the products you located in the warehouse as to those stolen from the Time DC truck on March 11, 1975?

A Yes, we were. Agent Dowd, who was also present at that time, had a fairly good breakdown of the load as far as numbers and identifiability, found in the warehouse was, was a quantity of 0240, some boxes which contained Schick Blades as mentioned in the warrant, and Agent Dowd also had other numbers thatidentified other boxes as also being from the stolen shipment.

Q Approximately how many cartons of Schick Products were located in the CBS Warehouse that day?

A I believe approximately 5,000 boxes.

Q After you located those boxes, did you then have occasion to see Chiam Kahan, Mor Wercberger?

A Yes, I did.

Q And who did you speak to first?

A I believe myself and Agent Dowd spoke to both Mr. Moishe Wercberger and Chiam Kahan in their small office at CBS at the same time.

Q You hadconversation with them; what, if anything, did you say to them?

A We both supplied a form advice of rights to both individuals. Both individuals informed both Agent Dowd and myself that they had read the form and understood the English language, and that they were aware of their Constitutional Rights, but neither person wanted to sign the form.

MR. CORCORAN: Can I have these marked 5, 5-A, B and C?

THE CLERK: Four advice of rights forms marked Government's Exhibits 5, 5-A, B, and C for identification.

Q I show you Government's Exhibits 5, 5-A for purposes of this hearing, and ask you: if you can identify those documents?

A Yes, I can.

Q What are they, sir?

A Both of these forms are the interrogation advice of rights forms which are used by our office, and have contained thereon the person, individual's Fifth Amendment and Sixth Amendment Rights.

The reason I know this is, as far as the particular documents are concerned, they bear my name as well as Agent Dowd's name and time that these forms were given to both Mr. Moishe Wercberger and Chiam Kahan.

Q Which one refers to Chiam Kahan?

A Okay; Government Exhibit 5.

Q And does it indicate thereon what time you advised Mr. Kahan of his Miranda Rights?

A It indicates the time 4:58 p.m., on 3/13/75.

Q And your signature appears on that?

A Yes, it does.

Q And Mr. Mor Wercberger, that would be 5-A?

A 5-A. Also, 4:58 p.m. and on March 13, 1975.

Q And your signature appears on 5-A?

A Yes, it does.

Q You indicated you and Agent Dowd gave Mr. Kahan and Mr. Mor Wercberger their Miranda Rights at the same time initially; is that correct?

A That is correct.

Q Was Mr. Solomon Wercberger present at the time?

A I don't now recall in the office where we were, no, in the building, I don't recall.

Q Did you recall subsequently seeing Solomon Wercberger on the premises?

A Yes, Ido.

Q Did you, in fact, advise him of his rights?

A I don't remember if I did.

Q I show you Government Exhibit 5-B; can you identify that document?

A Yes, Ican.

Q What is that, sir?

A It indicates that at approximately 5:30 p.m. on March 13,1975, Agent Dowd and myself did supply this form to Solomon Wercberger.

Q And did you advise Mr. Solomon Wercberger of his rights printed on that form?

A Yes, Idid.

Q And your signature appears on Government's Exhibit 5-B?

A Yes, it does.

Q Did Solomon Wercberger or Mor Wercberger or Chiam Kahan sign those forms?

A None of the three individuals did.

Q At the time you advised them of their rights, sir, did you place them under arrest immediately?

A No, I did not.

Q What occurred after you advised Chiam Kahan and Mor Wercberger of their rights at 4:58 p.m.?

A Both Mr. Kahan and Mr. Moishe Wercberger were being interviewed by Agent Dowd and myself regarding the Schick Products, and he asked them if they had any documentation for the possession of these Schick goods.

At that time, Moishe Wercberger started to go through some papers in the nearby filing cabinet to obtain documentation. Mr. Chiam Kahan started to tell us that on the day before, March 12th, 1,673 Schick Products were delivered on a Hertz truck and he believed that they were from International Trading Company. Mr. Kahan stated that he was not familiar in his business with the company known as International Trading Company.

Q Did he indicate whether he was familiar with that delivery, whether or not he had arranged or handled it?

A He stated that he did not have anything to do with that particular company or that delivery by them. He then went on to state that the same firm, apparently International Trading, had also delivered 3,032 cartons of Schick Products on that day, March 13, 1975.

During this time, Mr. Moishe Wercberger is looking for some documentation and Mr. Kahan went into the business practices that he is responsible for at CBS, and he informed me he was mainly concerned about obtaining new business by advertising in the Yellow Pages, by making contacts with different companies and by accepting goods from truckers that just happened to be going by his business.

(Continued next page)

Q Did you identify his position at the CBS warehouse?

A Yes, he apprised me he was president.

Q Did he indicate what Mr. Mor Wercberger's and Mr. Solomon Wercberger's positions were?

A Yes. He told me Moische Wercberger was the treasurer and Mr. Solomon Wercberger was secretary, and that all three men have equal say in all decisions made by the firm.

THE COURT: May I see the rights forms?

MR. CORCORAN: Yes, your Honor.

Q Did you have any conversation with Mor Wercberger at that time?

A Well, prior to terminating the conversation with Mr. Kahan, he went into the practices of truckers stopping by and dropping off some merchandise. He informed me that it was not a usual practice of his business to accept a shipment from a trucker, especially a trucker without shipping papers, but that it was not conceivably done by CBS Warehouse, but if a trucker comes in without a complete breakdown of the merchandise delivered, CBS Warehouse firm were very exact in the receipt that they give the delivering truckmen.

At about this time, a conversation of only two to three minutes with Mr. Kahan, Mr. Moische Wercberger came back with a handful of papers. The conversation got very loud because there were four of us in a small room, Agent Dowd, myself and Mr. Wercberger and Mr. Kahan, and at this time we asked Mr. Kahan to step outside the office so Agent Dowd and myself could talk to Mr. Wercberger, who was presenting us documents for the shipped products.

Q And Mr. Wercberger presented you with documents; is that correct?

A That's correct.

Q Did you, yourself, search through the files of CBS Warehouse looking for any documents?

A No, I did not.

Q Did you conduct any search of the office in which you were talking to Chiam Kahan and Mor Wercberger?

A No, we did not.

Q I show you a document marked Government's exhibits 2, 2-A, and ask you if you can identify those documents?

A Yes, I can.

Q What are they, sir?

A These are the first two documents presented to me by Mr. Moische Wercberger indicating, by Government's exhibit 2, that this instrument was presented to him by the truckman representing International Trading Company on

March 12, 1975, indicating that CBS Warehouse was supposed to receive, 1,654 cartons of razors and blades.

Q He indicated a shipment had come in on March 12, the day before you were executing the search warrant; is that correct?

A That's correct, 1,654 packages.

Q And to whom was the shipment consigned?

A It was consigned to International Trading Company, but care of the CBS Warehouse, foot of 50th Street, Brooklyn, New York.

Q And Government's exhibit --

A Government's exhibit 2-A is the second document Mr. Moische Wercberger gave me, which he told me was the receipt he had given the truckman for receiving the merchandise. I asked Mr. Moische Wercberger why the receipt was so vague, having already --

Q And when you say "vague," could you tell me what appears on the face of the exhibit marked 2-A?

A Yes. The only wording on the receipt is simply an abbreviation for International Trading Company, the words "one load," the word, "blades," Moische Wercberger's signature, which he told me it was, the date of March 12, 1975 and a couple of numbers which Mr. Wercberger informed me were internal numbers used by his firm.

Q What numbers are they, sir?

A 274-219 and letter "L" -- 631, I believe. He told me that was some type of coding and some type of internal information which would lead him to the spot in the warehouse where the goods were stored.

Q Does the receipt which Mr. Mor Wercberger gave to the truck-driver indicate how many cartons CBS had received on the 12th of March, 1975?

A No. Mr. Wercberger's receipt to the truckman which he told me the truckman took a copy of, there is no numbers of packages listed.

Q I show you Government's exhibit 3, marked for the purposes of this hearing, and I ask you if you can identify that?

A Yes. This is a similar form to Government's exhibit 2-A, indicating that it's a receipt from CBS Warehouse dated March 13, 1975. Upon presentation of this document from Mr. Wercberger, he explained to me that this document represented the receipt his firm had given to the truckman representing International Trading that day, for 3,032 cartons of Schick products.

I, at that time, informed Mr. Wercberger that there was no indication it was International Trading Company, because the consignee on this document is International

Trucking. I further asked him --

Q Did you ask Mr. Mor Wercberger whether he received a bill of lading with the March 13th shipment?

A Yes, I did. I asked Mr. Wercberger if he had the truckman's bill of lading indicating that the truckman had the right to deliver this merchandise to CBS, and at this point Mr. Wercberger told me that the truckman had no paper work for this delivery, that this document, the CBS receipt for the delivery of March 13th was the only document he had to show proof of delivery of said products.

Q Does that document indicate how many cartons were received?

A The document simply states 3,032 cartons, three loads, and Mr. Wercberger's signature again, but nowhere on here is there Schick products.

Q Did you ask him about that?

A Yes, I did.

Q And what did he say?

A There was no answer tb the question, other than the statement that this particular document was emphatically the receipt for the shipped products delivered.

Q On the 13th?

A On the 13th, yes.

Q Did you have any further conversation with

Mr. Mor Wercberger?

A Yes, I did. I asked him if he could explain to me the procedures that his firm has for handling merchandise that is in their custody.

Q And what did he say?

A He then presented to me a number of internal business forms and gave me a quick explanation of them that are used by CBS.

Q I show you Government's exhibits 2, 2-C, D, E, I'm sorry, 2-C, D, E and I ask you if you can identify them?

A Yes, I can.

Q What are they, sir?

A Government's exhibit 2-B and 2-C were two documents that Mr. Mor Wercberger supplied to me, which referred to the Schick products that had been received by his firm on the 12th of March, 1975.

Q Would that be the 1,654 cartons reflected by bill of lading marked Government's exhibit2?

A That's correct. And, I subsequently questioned Mr. Moische Wercberger regarding these two documents.

He explained to me that the invoice and the receipt, the invoice being Government's exhibit 2-B and the receipt Government's 2-C, were made up immediately or shortly thereafter the delivery at CBS Warehouse and that these documents, the invoice contained usually just the total amount of cartons received and a breakdown of the billing. The receipt was made up of a complete breakdown and manifest type instrument indicating exactly what was received, and simply a total amount for charges.

I do not recall if Mr. Wercberger told me if both documents or simply one of the documents is then forwarded by mail to the company or individual who required storage.

Q You said that Mr. Wercberger presented these to you with reference to the March 12th shipment; is that correct?

A Yes, the March 12th shipment of 1,654 pieces as evidence by the bill of lading, less ten left there by the truckman.

Q And he indicated these documents reflected the right, if you will, to possession of these goods?

A Yes, he did.

Q Did the documents he presented to you marked 2-B, 2-C, reflect 1,654 cartons received on March 12th?

A No, they did not. I informed Mr. Moische Wercberger, according to the documents, his internal documents he was presenting to me, showing the delivery of the 12th, that these documents only indicate a total of 1,606 pieces delivered and not 1,654 pieces as the bill of lading from the truckman indicates.

Mr. Wercberger had no answers to the discrepancy.

Q And I believe there are two other documents there?

A Yes. The Government's exhibit 2-B is again an internal document Mr. Wercberger informed me was a document used to keep track of any, a particular commodity removed from the warehouse by the person who had ordered it stored there. It's more or less an inventory count, and finally, Government's exhibit labelled 2-E is a white sheet of paper with the letterhead, "CBS Warehouse," with a breakdown, according to Mr. Wercberger, of what was delivered of the Schick products on March 12, 1975, and on this document is the total, 1,606.

Q Agent Colgan, prior to this conversation or at any time during this conversation with Mor Wercberger, did you indicate to him that he was under arrest?

A No, I did not.

Q You had previously been at the CBS Warehouse in reference to the February shipment of pharmaceuticals that you recovered; is that true?

A That's true.

Q And at that time, you also had conversations with Mr. Mor Wercberger and Chiam Kahan; is that correct?

A That's correct.

Q Did they present you with any documentation similarly on February 4, 1975?

A I believe it would have been February the 5th, Mr. Corcoran, and yes, they did. They did have some sort of paperwork for the shipment of Whitehall products that was in their warehouse that date.

MR. CORCORAN: Document marked as Government's exhibit 6.

THE CLERK: So marked.

Q I show you Government's exhibit 6 and ask you, can you identify that, sir?

A Yes, I can.

Q Is that a photocopy of a document which you have seen previously?

A Yes. It is a photo or a xerox copy of a document that Mr., I believe it would have been Mr. Moische Wercberger presented to me on the 5th of February, that he had received on the 4th of February, '75, indicating a delivery of articles that we had determined were Whitehall products that had been stolen, and this document was a fairly good breakdown of what was delivered.

Q Did he indicate that document --

THE COURT: Do you intend to offer at the trial

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any of the documents that you obtained on February the 5th in reference to the other --

MR. CORCORAN: Yes, your Honor. I intend to offer it as a similar act. My record, at this point, is twofold, one, not because there has been any motion with regard to it, but, one, to show that previous documents had been turned over to the FBI by Mr. Mor Wercberger with no coercion and resulting in no arrest, and they had similar conversations on March 13th, and there was no reason for Mr. Wercberger to feel any compulsion or feel he was under arrest, rather he was offering documents in support of his possession of the goods as he had previously. There was no arrest in February.

A This is the document Mr. Wercberger gave me.

Q Looking at the bottom right-hand corner, does your initial appear there?

A Yes, they are.

THE COURT: Did you come in with a search warrant in February; you just walked in and checked it out?

THE WITNESS: Wewalked in and requested the corporate officers for a consent to search, yes, sir.

Q And you received the consent to search in February; is that correct?

A Yes, we did.

Q Looking at the initials on the bottom, is that dated?

A Yes, it's dated 2/4/75, and my initials.

Q Is that the date you signed it?

A Yes, it would have been.

Q Does that indicate to you it was on February 4th rather than February 5, 1975?

A Yes, it would. I was in error on 2/5/75, this would have been the date of seizure.

Q You indicated that Mr. Mor Wercberger and Mr. Chiam Kahan were not placed under arrest?

A In which particular incident?

Q March 13th, when the documents were being turned over.

A That's correct.

THE COURT: In the first instance in February, did you seize the merchandise?

THE WITNESS: Yes, your Honor.

THE COURT: But there wasn't anything in the record that would have cast suspicion on the defendant or at least you didn't feel you had enough on intent?

THE WITNESS: That's correct, and plus the documentation in February, your Honor, and according to the Government's exhibits that I was just shown, number 6, was a document that I considered as a reasonable person being fairly good breakdown of what was received, and at that point I felt that these people might have been duped in February. The documents in March were in no way comparable to the documents in February.

Q What, if anything, did you do after Mr. Wercberger presented you with these documents then on March 13th?

A I felt I understood the explanation of the documents from Mr. Wercberger as best I could, and I felt there was a number of discrepancies. Mr. Kahan had told us 1,673 pieces delivered on the 12th, according to an invoice there, 1,654 pieces were delivered on the 12th, according to the truckman's invoice, and Mr. Wercberger gives me his internal paperwork that indicate only 1,606 pieces of Schick products were delivered on the 12th.

THE COURT: May I have the receipt of February 5th for the invoice?

Q That would be February --

A February 4th.

THE COURT: A receipt of February --

THE WITNESS: I'm sorry, your Honor, I was incorrect on February 5th, it was February 4th.

Q You indicated you compared the documents of March to February; you were referring to the documents relating to the deliveries on March 12th and March the 13th, were you not?

A That's correct.

Q Based upon these documents, did you, yourself, decide to arrest the defendants?

A No, I did not. I made two, at least two telephone calls to Mr. Raymond Dearie, the United States Attorney here in the Eastern District of New York and presented the facts of this case to him, on at least two occasions that evening, early that evening.

Q And did Mr. Dearie authorize the arrest of Mr. Mor Wercberger and Mr. Kahan and Mr. Solomon Wercberger?

A Yes, after I explained the paperwork discrepancy and the fact that a month or so before that we had been into the same location and had removed a large quantity of stolen goods at that time. Mr. Dearie had made the decision that an arrest should be made.

Q And did you then place the defendants under arrest?

A Yes, I did.

MR. CORCORAN: Thank you. I have no further questions at this time.

I move in evidence, the purposes of this hearing, Government's exhibits 1, 1-A, 2, 2-A through E, 3, the series of photographs marked 4, Government's exhibit 5, 5-A, 5-B and Government's exhibit 6.

THE COURT: Any objection?.

MR. YOUTT: No objection, for purposes of this hearing.

THE COURT: Let it be marked.

THE CLERK: They will be so marked as --

THE COURT: For purposes of the trial they will be considered for identification.

THE CLERK: All right, we'll then leave it as it is.

MR. YOUTT: Your Honor, may I indicate that I don't intend to move to suppress as being illegally received, the documents of February the 4th.

However, I do intend to oppose their admission as a similar act. I don't know if you want to entertain the legal issue on that particular issue right now, or sometime in advance of their being offered.

THE COURT: I will get to it.

Mr. Corcoran, before, he also said he had indicated to me about the trial, and I'll make my rulings at that time because it might be they're different in the context of the trial, than it is in this hearing.

MR. YOUTT: Okay.

CROSS-EXAMINATION

BY MR. YOUTT:

Q Agent Colgan, directing your attention back to March 13, 1975, I'm referring to the telephone information which you received concerning the search warrant, would you tell me, do you know where Agent Pecoraro was at the time he called you; did he tell you?

A I don't recall that, no.

Q Did you know at the time you received the telephone call of any efforts or activities that were underway by your office to detect or apprehend people involved in the theft of Schick blades?

A The only thing I really recall is the fact that I was obtaining a search warrant for a premises known as CBS Warehouse, and I did presume, I don't know if I was told that, at least one of our agents would be at that vicinity securing the premises.

Where Agent Pecoraro, or Dowd, was telephoning me from, I don't know.

Q Now, you later learned after receiving the information on the telephone that there were agents at the premises of CBS Warehouse on March 13th, at or about the time you received the information?

A I later learned there were agents there, yes. I later learned there was agents out there.

Q And I take it you later learned there was a delivery actually made to the CBS Warehouse made on March the 13th?

A That's correct.

Q Do you know now or have you been infomred by anyone now as to the delivery on March 13th came before the telephone call to you or after?

A I can give you a close approximation of time and tell you that I feel I had the information and was --

MR. CORCORAN: I'll object to Agent Corgan's surmise as to when the telephone call was made, if he doesn't know.

THE COURT: May I have the question and answer?

(Question and answer read by Reporter.)

THE COURT: Strike out the answer as not responsive. Just answer whether the information was given to you before or after the delivery on the 13th.

THE WITNESS: It was given to me before the delivery.

Q And the information that was given to you, was that an informer had been a participant in the trans-shipment, I'll call it, from the time the truck to certain other vans or vehicles; is that correct?

A That's correct.

Q And what additional information was given you concerning you that informer's role in any further disposition of those goods?

A The only action of the informer that I knew was that he had assisted in the unloading of the original trailer that was stolen into a number of rental vans, and these rental vans were going to two separate warehouses in Brooklyn.

Q So the information that you received was not that he had actually gone to those two warehouses, but that he had informed the agent that was speaking with you, Agent Pecoraro, and this was to be the destination of the goods that he had held to trans-ship; is that correct?

A No, that's not totally correct.

I believe I testified that he did subsequently deliver part of the shipment to one of the two warehouses, that being CBS Warehouse in Brooklyn.

Q That was the information which was conveyed to you by Agent Pecoraro?

A That's correct. And that, to his knowledge, he knew that a second part of the shipment was also delivered to S and F Warehouse, also in Brooklyn.

THE COURT: But he was present at the CBS Warehouse, at least Pecoraro told you that, he said he was at that warehouse?

THE WITNESS: That's correct, your Honor.

THE COURT: And this is before you made out the affidavit?

THE WITNESS: This is the obtaining of the information before the affidavit.

Q Did you later learn that that fact was incorrect?

MR. CORCORAN: I object to that, your Honor.

THE COURT: Which fact, that he was at the warehouse?

MR. YOUTT: That he was at the warehouse.

THE COURT: I'll allow it.

A I just have, very recently, there is a discrepancy perhaps, but I do not know it to be a fact, I have not been told by the informer or anyone else.

Q Have you spoken with Agent Pecoraro concerning this?

THE COURT: Wait, wait, wait.

Do you know as a fact that he was not at the warehouse, at CBS Warehouse?

THE WITNESS: No, I do not, your Honor.

THE COURT: That's the question, I thought.

MR. YOUTT: That's correct.

THE WITNESS: I do not know it as a fact that the informant was not at CBS, to my knowledge, he was.

Q Did you speak with Agent Pecoraro concerning this subject after the telephone conversation and up to the present?

A Not immediately after the telephone conversation, and only I believe on Saturday or Sunday, last Saturday or Sunday of this week I have spoken to Pecoraro about this.

Q At that time, what did Agent Pecoraro tell you concerning the fact as to whether or not --

THE COURT: Sustained as to form. The presence, I'll only take the presence of the informant at the warehouse, if any --

Q At that time when you spoke with Agent Pecoraro, what did Agent Pecoraro tell you concerning the presence of the informant at the warehouse, on or about March 12, 1975?

A According to Mr. Pecoraro, the informant who was just very recently re-contacted, seems to indicate that he was not at CBS, but was at the other warehouse.

Q And this information which was conveyed to you by Agent Pecoraro; is that correct?

A On Sunday of last week, of this week.

MR. CORCORAN: Could we have the date on that?

THE WITNESS: Sixteenth.

MR. CORCORAN: No, the date as to when the informant thinks he might --

THE COURT: I won't allow this, you'll have to ask him that on redirect examination.

MR. CORCORAN: I object to the question, your Honor, as not being specific.

THE COURT: Overruled.

Q Did you ask Agent Pecoraro at the time you spoke to him on the telephone on March 13th, any further details concerning the informer's role in the delivery of the goods?

A No, I did not.

Q Did you, were you aware at the time you spoke with Agent Pecoraro that Agent Dowd was accompanying him?

A I don't know if they were accompanying each other, I know I spoke to them on the telephone at the same time. I know they were together for the phone call.

Q Did you ask Agent Dowd any questions about the informer's role in the delivery of the goods?

A I don't recall.

Q And I take it you don't recall whether he supplied you with any information concerning that subject?

A Concerning the informant?

Q The informant's role in the delivery of the goods?

A No. Agent Dowd did not speak to me regarding the informant, at all.

Q Did you have any later telephone calls with Agent Pecoraro, prior to going out to execute the warrants?

A I may have, but I don't recall them.

Q When did you first learn that a delivery to the CBS Warehouse had been made on March 13th?

A To the best of my recollection, when I got out there with the warrants.

Q Did you speak directly, prior to obtaining the warrant, with anyone from the Schick corporation or did you speak with any agent concerning the serial numbers?

A To the best of my knowledge, it was an agent; it was not a representative of Schick.

Q There was a passage of several hours, I take it, between the time you received your phone call and the time the warrant was actually executed?

A That's correct.

Q What transpired during that time?

A The facts as I understood them from Agent Pecoraro and Dowd were presented I believe to the United States Attorney, Sam Dawson, here in this district, and he drew up the affidavit to the search warrant, which I subsequently did read, knew it to be correct to the best of my knowledge.

He then had to submit it to the steno pool, obtain copies, and then we subsequently went before the magistrate. This was a rather quick search warrant as far as time goes, and I believe it was approximately two and a half to three hours in obtaining it.

Q Do you recall how much time passed -- strike that.

Do you recall how long it took from the time the magistrate first got the warrant until he executed it?

A I can't give you a time span but I do recall the magistrate thoroughly reading the affidavit and me swearing to it, a procedure that usually takes anywhere from five to fifteen minutes.

Q Did any of the time which transpired between the time you received the telephone call and the time you received and executed the warrant, was any of that attributable to your inability to find the magistrate or to find him in his office?

A No, I can't say that it was.

Q I take it, then, there was no delay after you got to the magistrate's office attirbutable to his unavailability?

A No,no reflection on the magistrate at all.

Q Okay, now, during the period of time then during which the affidavit was being prepared, did you have any further contact with the agent who was engaged in the investigation of this case?

A I don't recall.

Q During that period of time, did you receive instructions as to what you were to do when you obtained the warrant?

A I don't recall, but I wouldn't need any, I know what to do.

Q Did Agent Pecoraro then discuss with you what to do?

A While I was still there?

Q While you were on the telephone the first time with him?

A I knew enough to bring the document to the vicinity of CBS Warehouse.

Q Did you knew there would be agents awaiting your arrival there?

A Yes, I did.

Q Do you know where you obtained that information?

A I would have just known it because the Bureau's procedure is to first maintain a physical surveillance on a premises until a search document can be received.

Q Did you obtain from Agent Pecoraro in your telephone call with him the identity of the informer, without telling me the identity of the informer?

A No, I did not know who it was and I didn't ask.

Q Now, referring, Agent Colgan, to your execution of the warrant, you say that you arrived at the premises of the CBS Warehouse when; approximately 4 o'clock, is that correct?

A I believe that's what I said, yes.

Q And you waited for 15 minutes, while you were there, with your fellow agents for approximately 15 minutes before coming into the premises; is that correct?

A Waiting might have been an incorrect word, it was a period of time of approximately 15 to 20 minutes where we're organizing ourselves as to the procedure we would follow when we entered the premises.

Q All right. When you entered the premises, did you all enter the premises, or did one or more than one of you remain behind in a car or at a different location?

A To the best of my recollection we left one car perhaps with two agents on the block while perhaps five to six of us or more, I don't recall, did enter the platform area of CBS.

Q So all of the agents who did enter the building entered through the same entrance; is that correct?

A That's correct.

Q When did you enter the building at that time, do you recall -- strike that.

Were there employees of CBS Warehouse working about the dock area, the platform area?

A I recall only one specifically, Mr. Fisher, who again I had met the month before.

Q Did you leave Mr. Fisher downstairs when you came up the elevator or did you bring him with you, or did he come with you?

A No. He brought us upstairs, we didn't know how to operate the elevators.

Q Were there other employees of the CBS Warehouse on the floor at the time?

THE COURT: Excuse me, one moment.

We will have a brief recess.

(Brief recess taken.)

THE COURT: All right, continue, Mr. Youtt.

Q I believe my question was, were there other employees of the CBS Warehouse on the floor where you arrived in the elevator?

A I don't believe so, but I can't be positive.

Q Do you recall what the other agents did who arrived with you at the time you arrived?

A I'm not really sure of that, I know I presented the documents, search warrants, to, I believe, Mr. Moische Wercberger at the time.

Q And I take it that contemporaneous with that you saw what you were looking for?

A That's correct.

Q Thereafter, do you recall how much time passed between the time you first arrived in the premises on the floor and commenced your questioning?

A I think the initial steps into the platform area of the CBS occurred at 4:30 P.M. The time it took, as I already testified to, to get the elevator downstairs to us, the subsequent it time to walk through the large warehouse floor areas amounted to a good 30 minutes.

Q So after you saw a quantity or a portion of the cartons that you were looking for, did you consume time with your fellow agents looking for other cartons in other locations as well?

A That's correct.

Q Did you cover more than one floor?

A I believe we did.

Q Did you, personally, take part in this particular aspect of the operation?

A I don't recall.

Q Did anyone, during the time that you were conducting your search, remain with the people that you first encountered, the employees?

A I believe someone did. I also do recall asking Mr. Wercberger and Mr. Kahan to remain in the office area.

(continued next page)

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Q When you returned to the office area, why, then, I take it that is the time when you took individuals into a private office; is that correct?

A I believe just the four of us, Agent Dowd, myself, Mr. Kahan and Mr. Moishe Wercberger went into a small office that they have, yes.

Q Do you recall what the other agents were doing at that time?

A They were making progress in determining exactly where all the pallets of the goods were, the Schick product goods were; they were making contacts with either our office or the victim company, Time DC, to get a truckman over there and a truck and means to help load up the stolen goods and get them out of there.

Q At that time, I take it, well, when was it that you first presented the individual whom you were questioning with the advice of rights form?

A I believe there's a time indicated on the document, and I think I testified it was 4:58 p.m.

Q But in the context of your activities, had you had any conversations with these individuals prior to presenting them with the advice of rights form?

A Yes, I did, but it was strictly to inform them of our purpose and the purpose was to search with a search warrant.

Q Do you recall if any agent, prior to commencing these discussions with the individuals whom you interrogated, had gone through any of the files of the CBS Warehouse?

A To the best of my knowledge, no one did or would have.

Q Now, did you ask -- strike that.

Directing your attention back to the February 5th entry upon the premises of the CBS Warehouse, at that time you did not have a search warrant; is that correct?

A I believe I was incorrect on the date of February 5th.

Q I'm sorry, February 4th, I adopted your first date.

A No, we did not have a search warrant in our possession when we entered the premises on February 4th.

Q And I take it, then, that the individual that you first encountered at that time was cooperative in talking to you, and whether you wanted to go to the goods in question?

A Pretty much so, yes.

Q Now, at that time, did you present the individual, well, whom did you speak with on February 4th?

A I specifically remember speaking to Mr. Moishe

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Wercberger.

Q Did you present him with an advice of rights form at that time?

A I don't recall.

Q Is it your standard procedure to present the advice of rights form to an individual under the circumstances which you found yourself on February 4th, after finding the stolen goods?

MR. CORCORAN: Objection.

THE COURT: Overruled; I'll allow it.

A No, not necessarily. Mr. Moishe Wercberger, I recall I specifically gave him his Fourth Amendment rights, as to demanding a search warrant, and he stated he understood my conversation, and was more than willing to escort us around.

We did find the stolen items and again, the same procedure as March 13th; we went back to his office and he more than willingly supplied documentation for the goods. He stated he had no other internal document at that time for those goods that were received on February 4th, 1975.

THE COURT: When you say "stolen," were they determined to be stolen at some time?

THE WITNESS: Yes, your Honor, on February 4th, myself and other agents did have a breakdown of the stolen goods and we matched our documentation to markings on those cartons.

THE COURT: Was it related to a hijacking?

THE WITNESS: Well, we have a definition; hijacking in our terminology is an armed stick-up with a weapon. The goods taken from CBS on February 4th were taken through deception and fraud of paperwork, so it was not a hijacking, but it was a truck theft.

THE COURT: It was a truck theft but not a hijacking?

THE WITNESS: Yes. In other words, your Honor, there was no physical weapon exposed.

THE COURT: You mean one of the employees of the trucking company were in it; is that what you're trying to say?

THE WITNESS: I am saying I, that I wish I could tell which one --

THE COURT: Is that still an ongoing investigation?

THE WITNESS: Yes, it is.

THE COURT: All right.

THE WITNESS: There were suspects arrested in that particular February 4th incident and that is still an ongoing case, I believe.

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THE COURT: Anybody convicted?

THE WITNESS: I am really not sure. I believe there were two suspects.

MR. CORCORAN: There were pleas covering some charges in connection with that.

THE COURT: I'm thinking of on the ground of prior similar offenses, you see.

MR. CORCORAN: Well, the prior similar would be offered in connection with possession of stolen goods.

THE COURT: Do you now realize, Mr. Corcoran, when you're talking about possession of goods stolen in interstate commerce and you're talking about that offense, you not only have to prove possession but prove they were stolen, and that means you have to prove the entire crime.

MR. CORCORAN: That's true, but for purposes of this case, the only thing that will be relevant whether or not the goods were stolen, and the defendants had reason to believe, therefore, from the events of that occasion, they might have stolen goods subsequently.

THE COURT: I'm not too sure. In this case, you have to show there was a hijacking, that the goods were stolen and that the defendant has knowledge they were stolen and possessed them.

MR. CORCORAN: I think perhaps what's throwing us off here is that the context of similar acts.

THE COURT: That is right.

MR. CORCORAN: Which is really evidence as to the defendant's knowledge and intent, not so much because of similar acts, we're not alleging they hijacked either load, but --

THE COURT: Well, I'm just pointing out to you when you talk about similar acts, and I said I have to determine that in the context of the trial, rather than the hearing; that's just what I meant.

MR. CORCORAN: I believe we can sustain an offer of proof on the February 4th event.

THE COURT: All right.

MR. YOUTT: I must say on that issue, your Honor, certainly it's going to be considered, so I would have to have a disposition of it before we get to opening statements and start talking about it.

THE COURT: No, no. Mr. Corcoran will not talk about it, prior similar acts in his opening; am I right?

MR. CORCORAN: Your Honor, I would like to

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resolve that issue also beforehand, because that's a significant part of our case.

THE COURT: I won't allow it, because I see, for a trial of the other case, to prove a similar act and possession --

MR. CORCORAN: As I anticipate. I would not think that Mr. Youtt would want to go into the details of the theft. I'm not suggesting hijacking, that they participated in hijacking on February 4th.

The evidence is going to be offered as relevant probative evidence, and the possession of stolen goods is relevant probative evidence of their knowledge and intent on March 13th.

THE COURT: Somebody is getting through. You have to prove the goods were stolen or are you prepared to do that in the prior case?

MR. CORCORAN: Yes, sir, what I'm saying is, I believe they don't have to be shown to be an armed hijack.

THE COURT: I didn't say that. I am saying you have to prove fraud or that somebody took the goods out of the lawful possession --

MR. CORCORAN: Goods missing from Whitehall Laboratories were found in the defendants' warehouse, that they were not lawfully taken from Whitehall Laboratories.

THE COURT: Did someone plead guilty to that taking them out of the Whitehall Laboratories?

MR. CORCORAN: No, your Honor. There was a plea entered in connection with, or a charge unrelated to it, but to cover that particular offense.

THE COURT: How are you going to prove that they were taken unlawfully out of the Whitehall Laboratories?

MR. CORCORAN: We have proved that through the Whitehall people.

THE COURT: That's what I want. Are you prepared to do that?

MR. CORCORAN: Yes, sir, and that they were subsequently recovered.

THE COURT: All right, go ahead, Mr. Youtt.

MR. YOUTT: Can we address the question of whether they're admissible for --

THE COURT: Let's do one thing at a time, Mr. Youtt.

MR. YOUTT: All right.

Q Agent Colgan, I was asking you about the obtaining of the Whitehall items or the Whitehall stolen goods

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Colgan

on February 4, 1975. I believe your testimony was you don't recall whether or not you supplied Mr. Mor Wercberger with an advice of rights form at that time?

A That's correct, I don't recall.

Q But I take it, then, on March 13th you determined to supply him with an advice of rights form; is that correct?

A That's correct.

Q What went into your decisions to provide him with an advice of rights form on March 13th, before interrogating him?

A Well, two things; I felt that they were not totally cooperative on the February 4th contact; however, I did not have any real solid grounds to determine that at that time; and secondly, because now by this time at five o'clock at night, I had been informed that, you know, that the shipment had come in the day before and a shipment had come in that day, and I just felt twice within a month, I was on stronger legal grounds if I presented these individuals with the formal advice of rights.

Q Isn't it a fact that you received some of the shipping documents or the documents which the CBS warehouse had in its file before presenting Mr. Mor Wercberger with his advice of rights on March 13, 1975?

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A That is not a fact at all.

Q IS it a fact that on March 13, 1975, well, do you recall whether or not Mr. Wercberger and Mr. Kahan were on the premises at the time that you arrived on March 13th, 1975?

A To the best of my knowledge, they were both on the floor when we exited the elevator, yes.

Q And with respect to your interrogation of Mr. Wercberger, did you, Mr. Mor Wercberger -- strike that.

Did you interrogate Mr. Solomon Wercberger?

A At some later time in that day I did, yes.

Q And did Mr. Solomon Wercberger provide you with any documents?

A I don't believe he did.

Q Do you recall whether or not anyone other than Mr. Mor Wercberger provided you with any documents?

A I don't recall that.

Q When you testified that there were raised voices between, or among the four of you, who were in a small office, the four of you were Agent Dowd, yourself, Mr. Chaim Kahan and Mor Wercberger. How would you characterize those raised voices?

A On the voices, they were those of Mr. Kahan and Mr. Wercberger, and both were trying to talk over the other. So at that point, we, Agent Dowd and I thought it would be best to just separate them and have them interviewed separately.

Q When Mr. Chaim Kahan left the room, was he escorted out of the room by an agent?

A I -- the word escort sounds incorrect. I would say there was an agent with him and they left together, but he was not forced or in any means physically taken out of the office, no.

Q Was he, Mr. Chaim Kahan, given any information as to whether he was free to go home at that time?

A I don't recall giving any of that information.

Q Is it a fair statement that he was given the instructions either verbally or otherwise not to leave the premises?

A I asked both men to remain in the vicinity of the offices as we began our search of the floor, yes.

Q Were they under arrest?

A No.

Q Would they have been free to leave at that time?

A No.

Q What would have happened had one of them determined to leave the premises at that time?

A I would have asked them to remain.

Colgan

Q [illegible] what if they had refused?

A [illegible] would have told them to call his lawyer.

THE COURT: Would you place him under arrest?

THE WITNESS: I don't believe so, your Honor, no.

Q You would not have placed him under arrest, but you would have restrained him; is that correct?

A I would have asked him --

THE COURT: Physically, you're talking about? Right?

MR. YOUTT: Yes.

A I would have asked him to call his lawyer at that point. I would have barred him from leaving via the elevators, just by standing there.

MR. CORCORAN: I am going to object to what would have happened under the circumstances.

THE COURT: I'll allow it.

Q And your basis for doing so would be that you had determined at that time there was reasonable grounds to believe that individual had committed a crime?

A At which particular time?

Q At the time when Mr. Chaim Kahan left the room in which you were and your partner were discussing the facts with him and his partner?

Colgan-cross/redirect

A No. The only reason for Mr. Kahan leaving the room was at our request, Agent Dowd and myself, to try to make sense of this instead of two individuals screaming at each other and us.

Q I was asking you about the circumstances; had he decided to go home at that time or leave the premises, you indicated you would have restrained him and the basis for that state of mind was that you had determined that there was probable cause or reasonable grounds to believe that he had been involved in a criminal act; is that correct?

A That's correct, and he would have been detained at this particular moment.

Q Okay.

MR. YOUTT: I have no further questions at this time.

MR. CORCORAN: Some redirect, your Honor.

REDIRECT EXAMINATION

BY MR. CORCORAN:

Q Certainly, if Mr. -- withdrawn.

Had Mr. Chaim Kahan or Mr. Mor Wercberger attempted to flee the premises prior to advising him of his rights, would you have arrested him?

A Yes.

Q You testified, Agent Colgan, that the process of obtaining a warrant took two to three hours; is that correct?

A I can't be positive of that. It could have been even longer.

Q You said it was a quick warrant?

A Yes, because two to four hours, in my experience, and no reflection upon the Eastern District, is a fair amount of time for a warrant.

Q Was it two to three hours or two to four hours?

A I would have to go to two to four hours.

Q It wasn't two to three hours?

A No, I stand corrected; two to four hours is a very quick time to obtain a warrant.

THE COURT: From the time you submitted to the court?

THE WITNESS: No, your Honor.

THE COURT: You mean to draw the papers and everything else?

THE WITNESS: Yes, your Honor.

THE COURT: Because I signed a number of warrants yesterday, I think it took me about ten minutes and I don't want to tell the number of warrants that I know were executed, but we don't mind a complaint, here at the Eastern District, that's the

Colgan-redirect

way we improve our work, our methods.

If it takes two to four hours from the time it's submitted to a Magistrate to get it signed, I want to know about that.

THE WITNESS: No, absolutely not, your Honor.

Q You are talking about from the time you presented it initially to the U.S. Attorney to the time it's executed?

A That's correct, from the moment I walk into the building until the moment I walk out, a period of two to four hours. I, myself and other agents, have obtained this and would consider that good time.

THE COURT: I know what you mean, because sometimes I have to wait an hour or two to get a one-page information typed upstairs.

THE WITNESS: I prefer not to answer that.

MR. CORCORAN: Perhaps that reflects on salaries paid to the stenographers, your Honor.

THE COURT: Or something else, I don't know why, but that's it. I don't mind the criticism of any place in the court. Let's have it. That's the only way we know there is something wrong. I've complained about that but nothing has happened, but I have complained about it.

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Colgan-redirect

Q You obtained this warrant at four o'clock; is that correct?

A I believe prior to four o'clock, Mr. Corcoran. I think my testimony is I arrived in the vicinity of CBS Warehouse at approximately four o'clock.

Q Let's put it this way: You testified earlier that you didn't know there was a delivery at CBS on March 13th until you got out there?

A That's correct.

Q Then you don't know, in fact, whether or not that delivery had begun when you received the phone call from Agent Dowd and Agent Pecoraro, do you?

A That's absolutely correct.

Q So you don't know whether or not the informant was on the premises at the time you received that information?

A No, I do not.

Q Or whether or not Agent Dowd or Pecoraro had seen him entering CBS Warehouse on the 13th when he received your information?

A That's correct.

Q So it was incorrect when you said before that your information came before the delivery on the 13th?

A That's true.

Q You don't know, do you?

Colgan-direct

A No.

Q You testified that you advised Mr. Chaim Kahan and Mr. Mor Wercberger and Mr. Solomon Wercberger of their rights; did you just present to them this form or did you do anything else?

A I did present to them the form. I gave their rights to them orally and I told them to read the paper and see if it was what I said.

All three people at different times -- I take that back, two of them, Mr. Moishe Wercberger and Mr. Kahan had the document at the same time.

THE COURT: Did you read from the printed form?

THE WITNESS: No, your Honor. I gave an oral statement from memory.

THE COURT: Tell us what you said.

THE WITNESS: I advised the men they had a constitutional right to remain silent silent, that anything they said could and would be used against them in a court of law, and at another, later time period I also advised them they had a right to an attorney and I informed them also if they wished to answer questions they could stop answering questions at any time until they contacted an attorney, and lastly, I told them that if they did not have the

Colgan-redirect

funds for an attorney, the Government would present, well, would have one for them.

Q Did you advise them of these rights because you considered them under arrest?

A No, I did not.

Q Is this your standard procedure on advising of rights of people when you are interrogating them?

A It's a standard procedure to give rights to an individual that we consider might be involved in crime, but yet not under arrest at that moment.

THE COURT: Well, you know you're obligated to give them those, though they are not under arrest, but under some restraint.

THE WITNESS: That's correct, sir.

Q Did Mr. Chaim Kahan and Mr. Wercberger respond to you in English when you spoke to them?

A Yes, they did.

Q Did you question whether or not they read English?

A I determined from them that they understood what I had said in English, and then giving them time to read the form, I asked them if they, did they understand, and they said yes, and I said, do you read and write English, and they both said yes.

Colgan-redirect

Q And Mr. Mor Wercberger indicated he understood the rights prior to turning over the document that you examined here today?

A That's correct.

MR. CORCORAN: Thank you. I have no further questions.

THE COURT: Anything?

MR. YOUTT: Nothing further.

THE COURT: You may step down. Thank you.

THE WITNESS: Thank you, your Honor.

THE COURT: Any others, Mr. Corcoran?

MR. CORCORAN: The Government calls Agent Pecoraro.

Your Honor, before I put Agent Pecoraro on, I think that there is a question of how far we have to go into this area. There are cases that would indicate that you need not beyond a warrant sufficient on its face, at all, so it would seem the appropriate question would be whether or not your Honor feels we must go behind the warrant or behind the affiant's testimony.

THE COURT: Well, I'm not going to give you any advisory opinions. If you don't call Mr. Pecorell, I assume the defendant would call him, so what's the difference?

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MR. CORCORAN: The Government calls Robert Pecoraro.

ROBERT C. PECORARO, called as a witness, having first been duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: State your name and spell it for the record, please.

THE WITNESS: Robert C. Pecoraro, P-E-C-O-R-A-R-O.

DIRECT EXAMINATION

BY MR. CORCORAN:

Q Mr. Pecoraro, by whom are you employed?

A By the Federal Bureau of Investigation.

Q How long have you been an agent?

A Six years and two months.

Q Are you assigned to any particular squad?

A Yes, sir, I am.

Q Presently, where are you assigned?

A I'm assigned to the New Rochelle office.

Q Where were you assigned in March of 1975?

A To the New York office of truck hijacking squad.

Q Calling your attention to March 12, 1975, approximately 11:00 p.m. in the evening, where were you at that time, sir?

A I was at my home.

Q What, if anything, occurred?

A I received a telephone call approximately 11:00 o'clock p.m. from a confidential source.

Q Did you have a conversation with the confidential source on the phone?

A Yes, I did.

Q How long had you been working with this confidential source prior to March 12, 1975?

A Approximately six months.

Q And hadyou received any information from that confidential source prior to March 12, 1975?

A Yes, I did.

Q Had you received information you considered to be reliable prior to that date?

A Extremely reliable.

Q Had the information resulted in any arrest or any seizures by the FBI?

A Yes, sir.

Q Could you relate some of the arrests and/or seizures that resulted from information from the source prior to March 12, 1975?

A Well, there was one arrest on a hijacking case

Pecoraro

on a truckload, tractor trailer truckload of cigarettes. Information given to me by the informant led to an arrest of one individual; there was a recovery and an arrest which resulted in, resulted in two arrests and recovery of stolen merchandise.

Q And you had a conversation with this source then at 11:00 p.m. on March 12th; what was the conversation?

A As I recall, the informant called me after the usual type of greetings, I asked him if he had any knowledge of a tractor trailer of Schick Products which had been hijacked.

His words back to me were to the effect that Peppi, we have the load. I said, "Who has the load?" He said, "Jimmy and Santa has it and I worked for him today unloading it."

I said, "Where is the load now?" He said, "It's on the location in Brooklyn. We took two loads out today, we took one to CBS Warehouse and took two to Brooklyn Navy Yard to S&F."

Q Did he tell you who was taking the load out?

A Yes, he did.

Q Who was working with him?

A Yes. He said Jimmy and Patty Diffilipo, Manny Gomez and himself. He also mentioned Joe Deluca, but

Joe Deluca was not one of the deliverers.

Q And did he give you any furtherinformation at that time; you said he told you that they had taken two loads out, one out to CBS and one to S&F, and did he give you any furtherinformation?

A Yes. He said I'd have to, tomorrow I'm going to bring another load to CBS Warehouse.

Q Did thatterminate the conversation?

A Yes.

Q Did you make any plans to meet with the informant?

A I'm sorry. I did make plans to meet with the informer the following morning, he was to be picked up by his associates approximately 8:00 o'clock, and I had made plans roughly, a 60 mile drive to meet him. I made plans to be in the vicinity where I could meet him approximately 7:30 that morning.

Q How long did the phone call last on the evening of March 12th?

A To the best of my recollection, I would say three to five minutes at the most.

Q Did you meet with the confidential source following the morning of March 13th?

A Yes.

Q Where did you meet with him?

A In Brooklyn, on Linden Boulevard at TSS Stores in the parking area.

Q Who else was present?

A Agent Don Dowd and Agent John Good.

Q And did you have any conversation with the confidential source at that time?

A Yes, sir.

Q What did you say to him and what did he say to you?

A Well, he reiterated what was said the previous night. The informant said they had a load of Schick Products which had presently been hijacked. The load was in Brooklyn, it had been partially unloaded onto two Hertz trucks.

Q Did he tell you from what kind of trucks it had been given?

A Yes, sir. He mentioned the name Time DC. He said that a portion of the load went to CBS, a portion of the load went to S&F, and he was going back that day with his associates to deliver the remainder of the load to CBS.

Q You had information with regard to the load prior to that date; is that correct, from this informant?

A Yes.

Q Had you ever instructed the informant as to any particular information you needed when he was going on such information?

A It is standard procedure when working with an informant who might be able to give you information on stolen products to try to remember numbers on the cartons, serial numbers, any kind of identification marks that he might see that could lead up to further identifying that product as being the product we're interested in.

Q Had you so instructed this confidential source prior to March 13, 1975?

A YEs, sir.

Q You questioned him about any such information on March 13th?

A Yes, sir.

Q What, if anything, did he tell you?

A He gave us numbers, 0240 as the only number he could recall. And, I said to him,"how many cartons or something to that effect did you see this number on?" And he said, "Thousands."

Q What, if anything else, did he tell you that day?

A He told me the address, the place he said 50th and 1st Avenue in Brooklyn. He said he was going back there.

Q Did there come a time then when you terminated your conversations with the informant on that morning?

A Yes, sir. The conversation was rather hurried as we met 7:30, quarter to eight, and he was being picked up around 8:00 o'clock, and he wanted to get back in his house.

Q He didn't indicate that he was going back to S&F that day?

A No, sir.

Q Or that any product was going to S&F that day?

A No, sir.

Q What did you say at that point on the morning of March 13th, after receiving the information?

A Agent Dowd and I proceeded to the vicinity of the CBS Warehouse in Brooklyn.

Q You set up your surveillance there?

A Yes, we did.

Q What, if anything, did you observe at CBS on March 13th?

A At 11:45, a Hertz straight truck pulled into the parking area. It's a rather large area and the truck pulled in.

The driver got out and he walked up to the loading dock, to the first area on the left of the dock. He spoke to a gentleman whom we later identified as Jacob Fisher.

He went back to his truck, got in the truck and backed it up to the warehouse.

Q Can youidentify the individual that got out at that time?

A Yes, I did.

Q Had you seen him before?

A Yes, I had.

Q WHo was it?

A Manny Gomez.

Q Is Manny Gomez one of theindividuals that your informant had named the night before?

A Yes, sir.

Q Did you see anyone else in that truck?

A Yes.

Q Who else was in the truck?

A My confidential informant.

Q What occurred then?

A Mor Wercberger, the gentleman on the left, came down to the dock area and he talked to Gomez and my informant. The doors were open and the truck was began to be unloaded when these other two gentlemen came down, and I would have to say talked or supervised unloading, or, as a matter of fact, Mor Wercberger drove the hilo machine to take the crate out of the truck.

Q Did they begin unloading the truck almost immediately upon your arrival?

A Yes.

Q Were you able to observe what was taken out of that truck?

A Yes, sir, we were.

Q What was taken off the truck in front of CBS Warehouse?

A Large quantities of Schick Products.

Q Could you see the designation "Schick" on the product?

A Well, yes, we did.

Q Where were the products taken?

A They were off loaded on the truck on the -- I can't think of the word, they were off loaded onto the truck and they were brought into the building, into an elevator. They weren't, they were taking them off and they stopped all other on-loading at that time.

Q Were there other trucks there before the arrival of this truck?

A Yes, sir.

Q You say this truck was given priority when it arrived?

A I would have to say that.

Q Did any other trucks arrive when you were surveilling thepremises?

A Yes. Shortly after 12:00 o'clock a U-Haul van, driven I believe by Patty Diffilipo and a Hertz van driven by Jimmy_Diffilipo pulled into the same general area.

Those two men got out of their vans and walked over to the loading, where the loading was going on. There was a conversation between everyone involved.

Q And when you say "everyone involved" besides Patty Diffilip and Jimmy Diffilipo, who did they speak to on the loading dock?

A I would have to say they first went to and spoke to Manny Gomez and then there was a conversation with these gentlemen.

Q Referring to Mor --

A Mor Wercberger, Chiam Kahan and Solomon Wercberger. Shortly after, the three men went out to the van before any further on-loading was done, and looked in both vans. Then Chiam Kahan went upstairs and I believe Sol went upstairs also. Mor stayed on the platform.

Q And this all happened in the area of 11:45 to 12:05?

A Yes, sir.

Q And did you have occasion to relay the information you had received from your confidential source to any other agents of the FBI for the purpose of obtaining a warrant?

A Yes, I did.

Q Whom did you speak to?

A I spoke to the Agent Don Dowd and Agent Pat Colgan.

Q Do you know when you spoke to Agent Colgan with reference to that warrant?

A I can't recall the specific time, it had to be roughly, shortly after the trucks arrived on the scene, but I cannot give you a specific time.

Q Was this telephonic communication?

A Yes.

Q Where was it made from?

A It was made from the building that we established our surveillance in. It was a Marine Corps Training Center, part of it was abandoned and we were in the abandoned section.

Q Where was that located with reference to the loading dock you're watching?

A Facing the front of the loading dock, to the left and I would say about 100 to 150 feet.

Q Where was the telephone located from your observation point?

A It was down in the main floor, in the Marine Corps Training Center.

Q Did you have occasion also to execute the warrant that was brought out to CBS Warehouse by Pat Colgan?

A YEs, sir, I did.

THE COURT: We went through all that, let Mr. Youtt cross-examine him. We had testimony from Agent Colgan and I assume it's just cumulative.

MR. CORCORAN: Yes, sir.

THE COURT: All right, go ahead, Mr. Youtt.

CROSS-EXAMINATION

BY MR. YOUTT:

Q Agent Pecoraro, when you spoke with your confidential source on the telephone on the first evening of March the 12th, you testified that it was a relatively short conversation; is that correct?

A Yes, that's true.

Q Was there any reason for it being short?

A Just as a matter of principal, I don't like to discuss too many things in detail on telephones.

Q Do you know where the confidential source was calling from?

A He was calling from his home.

Q Did you ask the confidential source at that time to give you any details on the telephone as to whathis role in the procedure was?

A Yes, I did.

Q And you testified that he said we have the goods or words to that effect; is that correct?

A Yes, sir.

Q And he also gave you information that he had been a participant in what I called earlier, the transshipment from the Time DC truck to the vans?

A Yes, sir.

Q He also told you there were still a quantity of goods remaining on the Time DC trailer or truck?

A Yes, he did.

Q At that time, did he give you any further details as to what he had done?

A He, the details if you call it details, he told me that he helped to unload the merchandise from the Time DC truck into the straight trucks that night, and then took it, took one load to CBS Warehouse and another load went to S&F.

Q Did he tell you that himself, he had taken the load to CBS Warehouse?

A Sir, that is the way I understood the

conversation to go.

Q And did you inquire further the next day when you met him at 7:30 in the morning in the parking --

A Specifically, did I inquire of him?

Q As to what exactly he had done in the process of delivery or transshipping and delivering these stolen goods?

A I think the conversation went the following day, when he reiterated his story for the agents and myself that were there, that a load had gone, it had been transported from the TIme DC truck to two straight trucks; one went to S&F and one went to CBS, and this was confusing at the time, the initials ABC and S&F, and he said I'm going to CBS today, that's the detail.

Q So did you conclude from that he had gone to CBS and not to S&F on March the 12th?

A Yes, sir, I did.

Q Did you later learn that was not a fact?

A Yes, I did.

Q And instead of going to S&F and not to CBS?

A Yes, sir, I did.

Q When did you learn that and how?

A I learned that in Colgan's office on Friday.

Q At the time --

THE COURT: You thought he was that he was at CBS on the 13th?

THE WITNESS: Yes, sir, it was my understanding, your Honor, if it happened --

THE COURT: I don't see any problem. The agent made a mistake in saying he was there on the 12th, when he stated that the load was delivered at S&P, CBS, but apparently the fact compensated for that error when the agent said he saw him on the 13th at CBS.

MR. YOUTT: That's what I'm going to, your Honor.

Q When you called Agent Colgan you were in your surveillance position; is that correct?

A Well, I couldn't be in my surveillance position when I called him, because the telephone was not, it was in that particular area. As a matter of fact, it was on the other side of the building.

Q Did you make a determination to obtain a search warrant prior to your setting up the surveillance at the CBS Warehouse?

A Did we make an attempt; we did make an attempt in the fact that we had to get an agent down here at the Eastern District in that regard, yes, we did make an attempt.

Q So that the call then --

A We were told that Agent Colgan would be down here or was here already.

Q The call then advised Agent Colgan to remain and await a phone call was something generated by you, in your determination, that you would be needing a search warrant; is that correct?

A Yes, sir.

Q Did you say that sometime in the morning of March the 15th; is that correct?

A I already testified that I cannot recall the exact time. I would have to say it was around noontime, probably shortly after noontime.

Q Well, your first alerting call was sometime before that, correct?

A Yes.

Q Now, when you made the second call or when you made the call to Agent Colgan, at that time, what had you seen?

A I had seen three trucks pull into the area.

Q Had you ever seen anybody in those trucks; had you been able to identify any of those trucks?

A Instantaneously.

Q Whom did you identify prior to calling Agent

Colgan?

A Manny Gomez, my informant, Jimmy Deffilipo and Patty Deffilipo.

Q When you called Agent Colgan, did you tell him where you were?

A I can't recall that I did. I assume I did tell him where I was.

Q When you called Agent Colgan, did you tell him what you had seen?

A I would like to say that there were several telephone calls made in a situation such as this. There is a time factor, there is a personal excitement, there is a lot of things to be taken care of. You're asking me questions now when I called Agent Colgan, did I tell him what?

Q When you called Agent Colgan, did you tell him what you had seen yourself?

A I,I don't recall, your Honor.

THE COURT: All right.

Q Did you make a determination when you called him to base your information sufficiently to obtain the search warrant on your informant's statement to you?

A As far as I'm concerned, I had a very reliable informant. He told me he had the load, he told me where it went. I went to that location, I set up a surveillance and the trucks that came in.

I had no, I had enough probable cause in my opinion at that point during that situation to get a search warrant.

Q Then, is there any reason why you would have not conveyed to Agent Colgan what you observed, in addition to the information you had received from your undercover informant?

A No, sir, no, sir.

Q And so did you convey that information too?

A I don't recall.

MR. YOUTT: I have no further questions.

MR. CORCORAN: I have one question.

THE COURT: You may step down.

MR. CORCORAN: May Iask a question, your Honor?

THE COURT: All right, go ahead.

REDIRECT EXAMINATION

BY MR. CORCORAN:

Q Have you conveyed your information to Agent Colgan, and did you call him back subsequently to say, by the way, we've also observed these trucks pulling in?

A No, sir, that would be --

Q You didn't make a second call to tell him about any further observance?

A No.

Q By the time that Agent Colgan arrived in the scene with the warrant, the unloading process was completed?

A Yes, it was.

Q How many hours did that unloading process take?

A It took approximately from 12:00 o'clock to 4:00.

Q And you made no attempt to reach Agent Colgan subsequently, to try and receive any further information?

A No, sir.

MR. CORCORAN: Thank you.

THE COURT: Anything further?

MR. YOUTT: Nothing further.

THE COURT: You may step down. That's the Government's case. Anything further?

MR. YOUTT: May I have one moment with my client?

THE COURT: Yes.

MR. YOUTT: I have no evidence to offer, your Honor.

THE COURT: All right, the affidavit erroneously stated that the informant was at CBS premises on the 12th of March, based on misinterpretation of the information given by the confidential informant to Special Agent Pecoraro. He was, in fact, on the premises on March 13th.

Even if the special informant were not on the premises of CBS, either the 12th or the 13th, and I don't have to reach this, but I'm saying that just to indicate how unimportant that error is, the information was that he had the load as Mr. Pecoraro testified, and that he knew part of it was going to S&F and the other part to CBS, and that would be delivered the next day.

That, in my humble opinion, would have been sufficient upon which to base the search warrant of CBS. The test under Agrila, as I recall, is that the informant must be shown to be credible and the information that he conveys to the agents must be shown to be credible, both the informant and the information was shown to be credible.

I find the affidavit sufficient in form and in substance. Now, we come to the matter of the admissibility of the statements made by the defendants, Kahan and Mor Wercberger and the documents sent over to the agents on March 13th by Mor Wercberger to Special Agent Colgan.

I find that the Miranda Rights were given to both Kahan and Mor Wercberger, that they understood them, that the statements were made and the documents produced in an effort by the defendants to exculpate themselves as they had on previous occasions. I find that the statements were knowingly and voluntarily made, that the documents that were turned over were selected by Mor Wercberger. He chose what he furnished to turn over. They were not turned over personally to any demand, but this was in a context of a discussion as to whether the goods were possessed knowingly and intentionally.

(Continued next page)

THE COURT: (Continuing) The defendants recognized this and it was their choice; they took the risk in attempting to prove that the goods were not possessed or received knowingly and voluntarily. I find that the documents were turned over voluntarily, without coercion of any kind whatsoever

Now, we turn to the question of prior similar crime. If the Government can prove that the merchandise, the drugs were stolen from the warehouse of Whitehall, and I forget the other name, or otherwise illegally possessed by some third person and that thereafter, they were stored at CBS Warehouse, I'll allow it as a prior similar crime. But, that's on the representation that there will be testimony that points to the unlawful possession by some third person of those drugs before they were delivered to the [illegible] Warehouse on February 4th or thereabouts.

MR. CORCORAN: May I say something as to that point, your Honor?

THE COURT: Yes.

MR. CORCORAN: I think beyond that, without even proving it we have the evidence, the Government would present would be that this load of goods was taken from the warehouse by the FBI and in the

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presence of Mr. Kahan, Mr. Wercberger on February 4th, it was taken from that warehouse as stolen property. The documents that were turned over to the Government by Mr. Wercberger on that date, will be shown by handwriting experts to be in the same exact handwriting as the documents that were turned over with the CBS load on March the 13th, the same form, the same handwriting; whether or not the goods were stolen, Mr. Kahan and Mr. Wercberger were alternatively put on notice that the goods came in with that document were stolen, and they have reason to believe when the goods came in on the same form and same handwriting a month later, were unquestionably stolen, so, in the event we weren't able to establish that these goods were stolen, these gentlemen were put on notice that goods coming in on that form and in that handwriting were stolen goods and this is the issue of knowledge and intent that would be admissible.

THE COURT: I'm sorry, I can't agree with you. It may be that because they were removed in the manner in which they were, they might have been questioned and maybe Mr. Wercberger or Kahan should have known that the goods delivered on invoices or shipping documents with that handwriting, might have been under suspicion, but that's a lot different than saying when they first took the other load, and that's what you must prove, a similar crime when they took the other load that they knew it was stolen. That's a similar crime, otherwise illegally possessed.

MR. CORCORAN: Well, your Honor, I think I'll offer --

THE COURT: Suppose you took that merchandise out of the warehouse improperly, you had no right to take it out of there and the people finally learned that they had bought the goods and there was some error in the billing.

MR. CORCORAN: Okay.

THE COURT: It wouldn't be similar crime, would it?

MR. CORCORAN: I am not suggesting similar crime, what I am making as my alternative argument is, I am offering evidence as to the defendant's conduct and activities previously, which would put them on notice, and would be evidence as to knowledge and intent a month later.

THE COURT: That's different. Now you're saying that you're proving knowledge and intent directly.

MR. CORCORAN: That's correct.

THE COURT: On the crime they're charged with, you're saying that handwriting of this kind was under question, so at least it's some evidence this was questionable merchandise.

MR. CORCORAN: That's correct.

THE COURT: That's not the same as proving the prior time when they took it, they knew that the goods that they were receiving were stolen.

MR. CORCORAN: That's correct, it's a different theory.

THE COURT: 1 o'clock, gentlemen.

(Luncheon recess taken.)

AFTERNOON SESSION

THE COURT: Mr. Corcoran, when I schedule a trial time, I expect you here and I don't want you to check to find out whether everybody else is ready, because if everybody did that, we would never get the trial started. When I say 1 o'clock, you get here at 1 o'clock.

All right, seat the jury.

Turn over the 3500 material, Mr. Corcoran, I want it marked; I expect every bit of 3500 material is marked.

MR. CORCORAN: I'll need time to do that.

THE COURT: When you turn it over --

MR. CORCORAN: I was turning it over now, shall I mark it at the same time?

THE COURT: Sure, give it to the Clerk and he'll mark it for you. Stack it up on his desk and he'll mark it.

Seat the jury.

(Jury is in the jury box.)

THE COURT: Mark the 3500 material 1, 2 and so forth.

All right, Mr. Corcoran, we're ready now.

MR. CORCORAN: May it please the Court, Mr. Youtt, ladies and gentlemen of the jury:

Corcoran-opening

As was indicated the other day, my name is Paul Corcoran, I am Assistant U.S. Attorney here in the Eastern District of New York, and as such, it's my job to present the evidence in this case to you.

As I indicated, this case involves possession of goods stolen from interstate commerce. It involves a conspiracy to possess those goods. The indictment charges that the defendants, Chiam Kahan, Mor Wercberger and Solomon Wercberger conspired with others to possess a quantity of goods taken during the course of a hijacking of a truck

The hijacking occurred on March 11, 1975.

Allegedly, they possessed those goods in violation of the law knowingly and willfully. The Government's case, what we intend to establish, and what we're concerned with here today, I'll tell you at this point in my opening what we intend to establish and how we intend to establish it.

The Government charges a conspiracy, voluntarily knowing and participation by these defendants in that conspiracy. The alleged conspiracy was to take a load of Schick razor products which were moved in interstate commerce from Connecticut to California.

Corcoran-opening

You will learn that on March 11, 1975, a driver by the name of Harold Bridgeforth together with his partner, James Lester, workers for the Time DC Trucking Company, picked up a 3500 pound load of Schick shaving products in Connecticut and were bound for California with it.

That, as they drove down through New Jersey they were pulled over to the side of the road, stopped by a car which was stopped in front of them and four armed men got out, took their truck, held them captive for a period of four hours.

You will learn that they were held in a car, subsequently released on Staten Island. We will charge, establish that conspiracy began a little earlier that same evening. There are a number of people who conspired to take that truck to possess those goods, including the defendants. You will learn from an individual by the name of Paul Pollari who will be testifying before you, that at about 8:30 on the evening of March 11th, about a half hour before Mr. Lester and Mr. Bridgeforth were hijacked, he got a phone call from another individual named James Diffilipo.

Mr. Difillipo was known to him, he was an associate, told him we may have some work tomorrow. By this, Mr. Pollari will tell you he understood it to mean they might have a truck to load in the morning. Half an hour before Mr. Bridgeforth was hijacked, Mr. Pollari knew they were going to be working.

You will learn that the next morning at about 8:30 in the morning, Mr. Pollari met with Mr. Diffilipo, his brother and another individual by the name of Manny Gomez, and the four of them went out and picked up the two rental trucks and took them out to a lot in Brooklyn, where they found buried among various trailers, tractor-trailers, the Time DC truck that had been taken the evening before from Mr. Lester and Mr. Bridgeforth.

You will learn from Mr. Pollari that they took the Schick shaving products from that stolen tractor-trailer and loaded them into the two rental vans, carried them off to a warehouse owned and operated by Chiam Kahan, Mor Wercberger and Solomon Wercberger, the very next day, the goods were in the possession of the men.

Mr. Bridgeforth will tell you that while he was in the back of the car being held captive on

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the floor, during the course of that hijacking, he overheard the people holding him captive say, "The buyer is well satisfied with the load."

You will learn that unknown to the defendant, the FBI had gotten the information from Mr. Pollari in advance that these goods were going to be unloaded at the CBS Warehouse, and set up a surveillance and watched co-conspirators move the goods into their warehouse.

You will learn that they watched Mr. Chiam Kahan and Mor Wercberger and Solomon Wercberger direct the unloading of the rental trucks into their warehouse. The Government will bring forth evidence that a search warrant was executed on the premises of CBS Warehouse, the warehouse owned by these defendants, and when that search warrant was executed, the stolen products were found there within 48 hours after the theft, that they had been there since March 12th; they were recovered on March 13th.

You will learn thatwhen Mr. Mor Wercberger and Mr. Chiam Kahan were questioned about these products as to why they had goods stolen a few hours before in their warehouse, they offered an explanation that they were just public warehousemen, they knew nothing about it.

You will learn that they offered some documentation, handed the FBI some papers that allegedly gave them a right to have those goods in the warehouse.

The Government will offer that documentation to you as proof for your examination, to show you that that was not the legitimate documentation, documentation offered by these gentlemen as their reasons for having possession of those goods, didn't even contain an accurate count of what the goods were; it wasn't the kind of documentation that anyone would accept for a load of goods, for which they would have responsibility. They weren't able to even determine from that documentation who supposedly put those goods into the warehouse.

The Government will establish that Chiam Kahan, Solomon Wercberger and Mor Wercberger didn't possess those goods as public warehousemen in an innocent fashion, but they possessed them as stolen goods and they possessed them knowingly and willfully.

We will present evidence that a few days after they were arrested for the possession of those stolen goods, they met with James Santa, Vincent Santa, the very man who directed the delivery of those goods into the warehouse, the very man who unloaded the Time DC trailer with Paul Pollari.

We will establish through evidence that these men had to pay for that load because they weren't storing it, they were buying it, and even though the FBI had recovered the goods, they had to pay for it.

We will establish a conspiracy between these gentlemen and the other people involved in that theft, in that possession, and we'll establish it beyond a reasonable doubt.

The testimony will come in from witnesses who will take the stand here before you, it will come in the form of documents that will be placed in evidence. We ask you, I ask you and I'm sure defendant's counsel will, to keep an open mind until the trial is completed, reserve decision until you join together collectively in the jury room to consider the evidence.

Doing that and considering the evidence we present to you, when this trial is completed, we'll ask you to return a verdict of guilty as charged.

Thank you.

12 THE COURT: Mr. Youtt?

MR. YOUTT: Thank you, your Honor.

Judge Mishler, Mr. Corcoran, ladies and gentlemen:

Being a juror is difficult under any circumstances, and it can be made more difficult or simpler based upon how a case is tried. There are many issues in this case, there are many facts which are going to be presented by the Government in its case.

I want to present to you a very brief outline of the defense of this case, and in doing that, I want to do two things.

Number 1, I want to alert you to your obligations which I'm sure you well recognize, to evaluate all the evidence and don't reach any conclusion until you havea chance to deliberate together after the trial.

And, secondly, to present you with an outline so that you don't end up spending a lot of time and mental energy on issues which are really not going to be issues in this case.

On the one hand, the defendants can come into a case like this and deny everything by his plea of not guilty. He does in effect deny everything

Youtt-opening

and puts the Government to the task of proving everything.

In this case, there are some things which really aren't going to concern you so, you must bear in mind one thing: The defendants in this case are charged with conspiracy to possess a stolen shipment of goods, and actual possession of it. They are not charged with the theft itself, they are charged with the events leading to their possession of the goods, and ladies and gentlemen, there is going to be evidence in this case that clearly establishes that these defendants were, in fact, in possession of goods which the Government alleges to be stolen in this case.

I expect, also, that the Government can establish and will establish that in fact, the goods were stolen, but as I anticipate and his Honor, Judge Mishler, will instruct you, the crime of possession is not proven unless it can be established that possession was with knowledge of the stolen nature of the goods.

The issue in this case, ladies and gentlemen, is that you are going to have to determine, based on the evidence, as to whether these defendants who owned and operated a warehouse in Brooklyn at the time of the alleged crime, took the goods which came in as ordinary warehousemen, as the defense will provide, or whether they took them as the co-conspirators that Mr. Corcoran has alleged, and I ask you ladies and gentlemen, first of all, to evaluate all of the evidence to determine what proper inferences can be made, to add up that evidence, and make a determination at the close of the case, whether beyond a reasonable doubt you conclude that these defendants possessed that quantum of knowledge necessary to establish their guilt.

Now, in presenting this position to you, ladies and gentlemen, I hope this has somewhat simplified your task in this case. I don't want to minimize what your task is going to be and I don't want to say that now that I have simplified the issues, it's going to be a simple conclusion to draw. You are going to have to evaluate the evidence, but you're going to be able to focus upon these issues and again, as I say, you must keep an open mind, you must weigh the entire evidence, until all of it is in, until you can reach the proper conclusion, and deliberate to a verdict in this

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case.

If you do that, you will be performing your duties as a juror and that is the most we can ask.

Thank you very much.

THE COURT: Mr. Corcoran, would you please call your first witness.

MR. CORCORAN: The Government calls Carroll Bridgeforth.

CARROLL BRIDGEFORTH, called as a witness on behalf of the Government, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

THE CLERK: Please state your name and spell it for the record.

THE WITNESS: Carroll, C-a-r-r-o-l-l, Lee, L-e-e, Bridgeforth, B-r-i-d-g-e-f-o-r-t-h.

THE CLERK: Be seated.

THE COURT: Is the Government ordering daily copy on this?

MR. CORCORAN: That would depend on defense counsel, your Honor.

THE COURT: All right. We won't discuss it now, I just wanted to determine how to take my notes, that's all.

DIRECT EXAMINATION

BY MR. CORCORAN:

Q State your name for the record, please?

A Carroll Lee Bridgeforth.

Q And Mr. Bridgeforth, by whom are you employed, sir?

A Time DC, Incorporated.

Q And what type of outfit is that, sir?

A It's a freight hauler or common freight hauler.

Q Trucking company?

A That's correct.

Q And what is your position, Mr. Bridgeforth?

A I'm a line driver.

Q How long have you been with Time DC Truck?

A Presently about five and a half years.

Q Calling your attention to March 11, 1975, were you working on that day, sir?

A Yes sir, I was.

Q And what was your assignment that day?

A My assignment was to pick up a trailer at New Haven, Connecticut and take it from New Haven into Winchester, Virginia.

Q And was the trailer designated to go anywhere

Bridgeforth-direct

from Winchester, Virginia?

A It was designated to go to California.

Q Did you, in fact, pick a trailer up?

A Yes, we did.

Q Were you alone, sir?

A No sir, I had a co-driver with me.

Q And who was that?

A Mr. James Lester.

Q Approximately what time, well -- withdrawn.
Where were you to pick the trailer up?

A At New Haven, Connecticut terminal.

Q Terminal of Time DC?

A That's correct.

Q And what was the trailer loaded with, sir?

A It was loaded with Schick products.

Q Approximately what time did you pick the trailer up?

A Oh, let's see; I'd say approximately sometime between 7 and 7:30 that evening.

Q In the evening?

A Yes, sir.

Q And where did you go from there, sir?

A Well, we went to the Mayflower Truck Stop and had dinner and then we left there and proceeded home.

Q What route were you taking to Virginia?

A Well, from New Haven we take Interstate 95 in and across the Cross Bronx Expressway, the G. W. Bridge and then Interstate 80 West and the 287 South.

Q So yo u went from Connecticut into New York and over into New Jersey; is that correct?

A That's correct.

Q With the load of Schick products?

A Yes, sir.

Q What, if anything, happened when you arrived in New Jersey?

A Well, we were proceeding westbound on Interstate 80, at the junction of 287 when a car cut in the lane right in front of our rig and forced us to that side of the road.

Now, at the time I didn't know whether it was you and your family or whoever it could have done it, so I tried to avoid hitting the automobile and ran the rig completely out of the area. I couldn't even pull it off.

Q You took the rig off the road?

A Well, it was off on the edge of the road, just as far as I could get it without hitting the car.

Q Did you come to a full stop?

A Yes sir, I had to.

Q What happened at that point, briefly?

A There were either three or four men that came out of the car, just about the time I got the rig stopped and again, I was trying to judge my distance to keep from hitting the car, and at the same time I'm assuming there were three that went to the right-hand side and one jumped on my side with a gun.

(Continued next page.)

Q Can you describe the individuals?

A No, sir, I can't.

Q What were they wearing?

A Well, they were wearing the type of knit hat, stocking cap and just casual clothes.

Q What occurred at that point?

A Well, I realized that they had taken my partner, again, I thought maybe I had cut someone off down the road or something, and they were mad about that.

But, then I looked to my side and I saw a guy beating on my window over with a gun, and I was having a hard time opening it because this was a different tractor than we normally have, it was a later model and it had a different type of door lock, and when I opened the door the man put the gun to my head and said, "SHut your eyes and sit right there and we'll tell you what to do."

Q Where was Mr. Lester at that time?

A At that time they had already taken him from the truck and thrown him in the car.

Q Now, the car that dropped you off, could you describe it for us?

A It was a later model, of I would say either a tan or light cream, in description.

Q Do you recall the license plate of that car?

A I, under, after interrogation again with one of the agents, I told him that I recall the numbers 538. Now, I couldn't exactly remember where they came from, I assume that that was probably the tag, but at least the first numbers of the tag.

THE CLERK: Photographs marked Government's exhibits 7 and 7-A for identification.

Q Mr. Bridgeforth, I show you what's been marked as Government's exhibits 7 and 7-A for identification, and ask you have you seen those photographs before, sir?

A Yes, sir, I have.

Q And can you identify what's in those photographs?

A It's the late model Plymouth, Grand Fury, four door hardtop, bearing New York license plate 738 ZAO.

Q How does that compare by description with the car that cut you off?

A It very conceivably could have been the car.

Q Can you possibly say whether it is or not?

A No, sir, I cannot.

Q What occurred then after Mr. Lester was taken from the truck?

A Well, since I had my eyes closed and the man was over here with the gun to my head, and another man came on and got in the truck and sat up on the dog box, that's what we call the engine housing, the dog box, and he put a gun to the right hand side of my head and told me to sit there with my eyes shut, he'll tell me when to move.

The door on this side shut, and I'd say approximately 30 seconds later he said to "open your eyes and follow the tail lights," which I did, I followed them down.

Q That's the tail lights of the car that pulled in front of you and stopped you?

A Yes, sir.

Q How far did you follow that car?

A We went southbound on Interstate 287 to the first cut-off, went off the ramp, came to a stop and crossed to the bridge and back down to 87th, northbound.

Q Heading back towards New York?

A Well, after we'd have to get back to Interstate 80, which we did; we eventually got back on Interstate 80 off 287,and we had to pull off the side of the road and stop again, at which time I had to shut my eyes again.

Q You say you had to stop again; were you told to stop again?

A Yes, sir, yes. We were told to stop again.

Q What occurred when you brought the truck to a stop?

A I pulled off on the side of the road and the man said, "shut your eyes," and I sat there. Then ,again, a few seconds later the door opened over here on this side, and the man grabbed me by the arm and jerked me out of the truck, and he pistol-whipped me and dragged me to the car and threw me on the back floor of the car.

Q Is that the same car that caused you to stop?

A Yes.

Q Was anyone in the back seat with you when you were thrown in there?

A My partner was lying on the seat.

Q Where were you put, sir?

A I was on the floor of the car.

Q Approximately how long were you held in that car?

A Just, assuming that it was again, I say it was just a few minutes, around 9 o'clock, give or take a few minutes. They let us out in Staten Island approximately one or two minutes after midnight.

Q So you were taken from New Jersey into New York; is that correct?

A That's correct.

Q And you, yourself, and Mr. Lester were in the car during that period from 9 till after midnight?

A Yes, sir.

Q That would be the early morning hours of

March 12, 1975?

A That's correct.

Q Were you released in Staten Island?

A Yes.

Q Well, while you were in the car, Mr. Bridgeforth, was Mr. Lester, I take it there were other individuals in the car with you; is that correct, driving the car?

A There was at least two. There was a driver and the man sitting on the right-hand side with the gun kept sticking it in the back of my back, and he said, "Have you moved yet," and I said, "no, sir, I'm trying not to."

Q Did the car make any stops while you were being held?

A It made at least three stops.

Q How long were these stops?

A I would say approximately a minute to two minutes long.

Q Were you able to see anything that was going on while the car was stopped?

A No, sir, because I was covered up with a coat.

Q Did you overhear any conversations in the car while you were being held?

A On the last stop, I definitely heard the man that had got in on the right-hand side.

Bridgeforth - direct

Q I'm sorry, let me put it to you better; you said on the last, whatever, one of the stops?

A The last, the third stop that we made, there was some conversation each time, I couldn't understand it because they would turn the radio on up.

Q This conversation was not between you and Mr. Lester; is that right?

A No, sir.

Q It was between the other individuals in the car?

A That's correct.

Q What, if anything, was said?

A Well, they didn't turn it up quite as loud enough and my head was right down there next to the seat where I could hear the conversation in the front seat, and the man that got in the car said that, "the buyer was well satisfied with the load."

Q About how long was this after you had been taken from your truck?

A About two and a half hours, because immediately after that they took us over to Staten Island, where they let us out.

MR. CORCORAN: Mark that, please.

THE CLERK: Two photographs marked Government's exhibits 8 and 8-A for identification.

Q Mr. Bridgeforth, I show you Government's exhibit 8 and 8-A for identification; can you identify what is contained in those photographs, sir?

A Yes, the trailer owned by Time DC bearing the number, trailer number of 1047.

Q And by that, can you identify that tractor, sir, that trailer that --

A Yes, that's the load or that is the trailer that the load of products was on, the shipped products.

Q That was the trailer that was taken from you, on the evening of March 11, 1975?

A Yes, sir.

MR. CORCORAN: Thank you. I have no further questions.

Your Honor, I offer Government's exhibits 7, 7-A, 8 and 8-A, subject to connection.

THE COURT: Any objection?

MR. YOUTT: Objection to 7 and 7-A, but not 8 and 8-A.

THE COURT: May I see 7? Do you want to argue the objection, Mr. Youtt?

MR. YOUTT: yes.

THE COURT: The jury may be excused.

(Jury left the courtroom.)

THE COURT: Can we agree on whether or not you're going to order a transcript?

MR. YOUTT: We have not ordered one, your Honor.

THE COURT: Do you intend ordering it?

MR. YOUTT: Not daily, your Honor.

THE COURT: Well, it won't do you any good unless it's daily.

MR. YOUTT: That's right. I certainly, in the event --

THE COURT: So they're not ordering it; does that mean you will not?

MR. CORCORAN: I would have to get permission from my office, that's our policy.

THE COURT: All right.

The other question, then, that I have before I go to the argument on the objection, was the conflict, possible conflict of interest in one lawyer representing all three defendants. I asked you about that on two or three previous occasions, you have assured me you have gone over all possible problems and there is no conflict of interest?

MR. YOUTT: That's correct, your Honor.

THE COURT: And you're still of the same mind?

MR. YOUTT: Yes.

THE COURT: And you, Mr. Corcoran, based on the case as you know it, you can't see any conflict of interest in Mr. Youtt representing the three defendants

MR. CORCORAN: The only conflict I can see is the one that always exists, as to what an individual might wish to do were he not represented by the same counsel. Factually, there is no conflict as I know it-

THE COURT: Do you expect one might take the stand while the others might not?

MR. YOUTT: No, I don't your Honor.

THE COURT: Do you intend to argue that one is more culpable than the other?

MR. YOUTT: I don't expect to argue that.

THE COURT: Those are the usual problems.

Now, what do you say is wrong with the exhibits?

MR. YOUTT: As I understand the witness' testimony, he said that looks like the car that might have stopped, but that's not the car, so as far as he knows, and since it's tenuous, it certainly hasn't been established being in any way relevant to the case.

THE COURT: Is that the only objection?

MR. YOUTT: Yes.

Well, that, yes, that's right, on that.

THE COURT: You object to that to this one in that there are people in this picture?

MR. YOUTT: May I see them, please?

THE COURT: Or that in one picture the car is disassembled, the seat is out?

MR. YOUTT: Well, I'll add to this, I object on the grounds of prejudice, your Honor, in that the car is apparently being disassembled as a suspicious car.

THE COURT: Objection overruled. It may be admitted to evidence and marked; I'll just instruct the jury since it's going to show what the car looks like, and that they should disregard the activity going on with the car.

MR. CORCORAN: there will be additional evidence offered that it was rented for use during this hijacking.

THE COURT: Actually it's difficult for anybody to prove, particularly intangible items that the very item is the item, but, if the witnesses said it looks like this, that at least as demonstrative as he can draw a picture of what it looked like.

THE CLERK: Government's exhibits 7 and 7-A, 8 and 8-A, previously marked for identification, now marked into evidence.

A five page report dated March 12, 1975 marked Government's exhibit 3500-1, and a 1-page report marked 3500-2 and a one-page report dated October 9, 1975, marked Government's exhibit 3500-3, and a one-page report dated February 23, 1976 marked Government's exhibit 3500-4.

Grand jury minutes of Paul Pclari dated February 14, 1976 marked Government's exhibit 3500-5.

THE COURT: And you all have duplicate copies of these, I take it?

MR. CORCORAN: Your Honor, I will provide these, I intend to turn these over. I will have to get additional copies, but Mr. Youtt can use them temporari

THE COURT: Fine.

How about requests to charge; when do you expect to have them?

MR. CORCORAN: I'll try to have them by Thursday morning, your Honor.

THE COURT: All right; and you, Mr. Youtt?

MR. YOUTT: That's fine.

THE COURT: Okay, seat the jury.

(Jury enters courtroom.)

THE COURT: Exhibits 7 and 7-A were marked in evidence, and 8 and 8-a, but it was 7 and 7-A that are introduced for limited purposes, showing what this witness said the car looked like, disregarding the fact that this one photo shows the car being disassembled, the seat was out and that there were people in the pcitures, just eliminate that from your consideration, just look at the picture of the car.

All right, you may continue, Mr. Corcoran.

MR. CORCORAN: I have no further questions.

THE COURT: All right, Mr. Youtt, then, please.

CROSS-EXAMINATION

BY MR. YOUTT:

Q Mr. Bridgeforth, have you driven this route previously?

A Yes, sir.

Q And I take it you have driven in the New York area before, also,

A No, not in the area itself. Our actual route is from Winchester, but just through this area here.

Q Winchester; what state is Winchester in?

A Virginia.

Q That's where you originate out of; is that correct?

A That's correct.

Q Do you frequently go to Connecticut?

A We, three times a week.

Q So, you're familiar, well familiar with the route from Winchester to Connecticut, I take it?

A Yes, sir.

Q And I take it you are well familiar with Interstate 80; is that correct?

A That's correct.

Q Now, when you come down Route 95 from Connecticu to intersect Interstate 80, how near are you to New York City?

A We go right through it, Cross-Bronx Expressway.

Q So you're actually in the city of New York?

A Yes, sir.

Q Now, on the evening in question, on the date in question, about what time did you leave your New Haven point of origination?

A The exact time, I couldn't recall unless I had my log book, I could tell you when it was exactly. I'm assuming it was about 7, 7:30, something like that.

Q And how long did it take you to get from New Haven down to where you intersect across the Cross-Bronx Expressway?

A Well, after we arrived here, approximately 9 o'clock, because that was the time my partner and I had discussed we were going to switch-hit driving.

Q And how long were you on Route 80 before you were stopped, as you testified?

A I would say approximately 20 minutes.

Q All right.

After you were stopped, do you recall, and again I'm not asking for a specific recollection, but to the best of your ability, do yourecall how long you were actually in your truck before you were transported, transferred to the automobile?

A My partner was immediately transported to it and myself, I was driving the rig.

The only thing I can assume, no one in the car really knew how to drive the tractor-trailer around the close turns that I had to make, so they had to get the truck aimed back towards New York before somebody or even yourself would probably drive, just looking at the diagram on the ceiling, the assisting diagram.

Q All right. Do you recall, did you have a watch on at the time?

A Yes, I did.

Q Do you recall about what time you left your truck; in other words, at what time were you placed in the automobile when you were in this different direction?

A I'd say approximately 9:15, 9:20.

Bridgeforth - cross

Q All right. Now, at approximately 9:15 to 9:20, were you able to look out of the automobile as you drove away?

A No, sir, no, no, I was --

Q So you did not see anything that was going on at the time?

A See, I was still in the truck at the time I had to take it down to 87 to get off the first exit, go back across and come back. My partner was in the car, but once we got on 80 I had to stop there and shut my eyes.

Q When you shut your eyes, what happened to you?

A He just told me to sit there and the door opened and this guy grabbed me by the arm and wham, from five feet up in the air I went down to the ground without touching a step.

Q And then you went to the automobile; is that correct?

A Yes. He hit me with his pistol two or three times, I can't recall exactly because that first crack was a pretty good one.

Q From the time you got off the truck cab -- I'm sorry -- From the time you got into the automobile and you were unable to see anything as to what happened to the truck; is that correct?

A That is correct.

Q Now, you say there were three telephones, three stops, I'm sorry, three stops that were made in the car while you were travelling?

A Yes.

Q Were they made soon after you left or were they made some time before you were released; what time were you released?

A Just a few minutes after midnight. I did look at my watch when they finally let us get out of the car, and heard the car leave. Then I looked at my watch. It was about one or two minutes after midnight.

Q Do you recall when the stops were made?

A No, sir, I couldn't. Where the stops were made it was dark and I couldn't see. This is a different watch than the one I had on at the time. I couldn't see the face on the dial.

Q At the time when you were released in Staten Island, had you been there for some time or did the car park and you were in it, or did it just stop and you were let out of it?

A You're talking apparently from the last phone call, which satisfied the two men in the car, that they left immediately and took us to Staten Island, and the man in the front told me, "Now, don't call the police for at least twenty minutes."

Q When you say they left immediately and took you to Staten Island, do you know where you were at the time they left immediately?

A No, sir, I wish I did.

Q How long were you in the car, between the time they got back in the car from the last stop and the time you were let out of the car?

A About 30 minutes.

Q Okay, then what did you do when you were let out of the automobile?

A Well, they still had both of us covered. They had a blanket or something over my partner and a coat around my head, and the man stood there with a gun and I don't know whether or not he had one on my partner and one on me, he had one on me and he said, "If you turn around -- I'm going to put this cover over your head. If you turn around, you're dead." And I said, "You don't have to worry about that, pal, I'm going."

So I walked away from the car and I heard the car, I heard it leave, but he had told me at that time that there were three cars there, and I heard a second car.

Q I take it there came a time when you notified the authorities; is that correct?

A It was exactly eight minutes from the time we started to walk and I saw a bar across the street with lights. We walked across the street and I called, I guess it was the Staten Island police department.

MR. YOUTT: Thank you, I have nothing further.

THE COURT: Anything further?

MR. CORCORAN: I have no further questions.

THE COURT: You may step down. Thank you. Next witness.

(continued next page)

THE COURT: Next witness?

MR. CORCORAN: The Government calls Paul Pollari.

I apologize for the delay, your Honor; the witness is in the witness room and will be brought right in.

THE COURT: We have a telephone in here to the witness room.

MR. CORCORAN: We'll use that next time.

PAUL POLLARI, a witness for the Government, having been duly sworn by the clerk of the court, testified as follows:

THE CLERK: Would you state your name and spell it please for the record.

THE WITNESS: Paul Pollari, P-o-l-l-a-r-i.

DIRECT EXAMINATION

BY MR. CORCORAN:

Q Mr. Pollari, how old are you, sir?

A Twenty-four.

Q Are you married?

A Yes.

Q Any children?

A Yes.

Q How many?

A One.

Pollari-direct

Q How old is that child?

A Seven months.

Q Are you employed?

A I'm laid off right now.

Q What did you do before you were laid off?

A I was a wire worker.

Q A wire worker?

A Yes.

THE COURT: What is that?

THE WITNESS: I used to put -- I was a coiler. I worked on a machine and I used to coil wire.

THE COURT: An assembly plant you mean?

THE WITNESS: Yes.

Q Calling your attention to March 12, 1975, Mr. Pollari, did you have occasion to participate in a loading of a truck?

A Yes.

Q What kind of truck was it?

A Time DC, 45-foot trailer.

Q What did the truck contain when you unloaded it?

A Various Schick products.

Q Where did this unloading take place?

A At Zimco. It's a trailer yard on McGuiness

Avenue.

Q When did you first learn that you were going to be occupied on March 12, 1975?

A About 7:00 o'clock, 7:30 on the previous evening.

Q On March 11?

A Yes.

Q 7:30 in the evening?

A Yes.

Q What exactly occurred at that time?

A Well, I got a call from Jimmy Diffilipo stating that I had work to do in the morning.

Q Jimmy Diffilipo?

A Yes.

Q Did you meet with Jimmy Diffilipo the next morning?

A Yes.

Q About what time?

A Early; 7:00 o'clock, 7:30.

Q Where did you meet him?

A He picked me up at my house.

Q Was he alone?

A He was with his brother, Patty Diffilipo and Manny Gomez.

Q Manny Gomez?

A Yes.

Q There were four of you together about 7:00 in the morning on March 12, 1975?

A Yes.

Q Where did you go?

A From there we went to Zimco -- no, from there we went -- excuse me, we went to Tony's Gulf to rent the trucks.

Q Where is Tony's Gulf Station?

A It's on Rockaway Avenue and Atlantic Avenue.

Q And so you rented the trucks; is that correct?

A Yes.

Q Did you personally rent any trucks?

A No sir.

Q How were the trucks rented?

A Well, I was sitting in the car and Manny Gomez got out and walked into the place. He was in there about 45 minutes.

Q Manny Gomez rented the trucks; is that correct?

A Yes.

Q What kind of trucks did Manny Gomez get in Tony's Gulf Station?

A He got two 18 to 20 feet straight job trucks and one van.

Pollari-direct

Q Where did he go with the trucks?

A Well, Manny and I, Manny Gomez and I, we got in one truck.

Q Speak up, Mr. Pollari.

A Manny and I got in one truck. Patty drove one and Jimmy Diffilipo drove the van.

We proceeded to Zimco trailer yard on McGuiness Avenue.

Q Can you describe the premises?

A It was a trailer yard. It had 30, 40 trailers in it. This truck was about midway. You couldn't see it. It was buried. It was about midway in the yard.

There was a whole lot of things around it, you really couldn't see it from the outside, or when you walked through the gate you couldn't see it.

Q How many trailers were in the yard when you arrived?

A Well, there's about 30, 40; there was a lot. I didn't count them.

Q Did you proceed to any particular trailer?

A Yes. We went over to the Time DC trailer.

Q Where was the Time DC trailer located in the lot?

A It was about in the middle. It was in the middle surrounded by a lot of other trailers, it was hidden.

You had to either get up on top of a trailer to look to see. There was a hole, or get under to see there was a vacant space in there.

Q So it was surrounded by trailers?

A Yes.

Q Could it be seen from the street?

A No.

THE COURT: A trailer doesn't have a power unit on it, does it; in other words --

THE WITNESS: No, it's just the box alone.

THE COURT: Just the box?

THE WITNESS: Yes.

THE COURT: The other part of the cab, it would be --

THE WITNESS: Tractor.

THE COURT: The tractor would be the power unit?

THE WITNESS: Yes sir.

THE COURT: It was just the trailer?

THE WITNESS: Yes, just the trailer.

MR. CORCORAN: Excuse me, your Honor.

Can I have this photograph marked, please?

THE CLERK: Photograph marked, Government

Ex hibit 9 for identification.

Q Mr. Pollari, I show you this photograph and ask you if you can identify that premises?

A Yes; this is the yard.

Q That's the yard?

A Yes.

Q Is that the premises where you went on the morning of March 12, 1975?

A Yes.

Q Who was present at the Time DC truck when you and Manny Gomez --

A Joe DeLuca and Vinnie Santa and us, and Jimmy Diffilipo. Well, we all came together, Joe DeLuca and Vinnie Santa was there when we got there.

Q Was the Time DC truck opened when you arrived?

A Yes, it was.

Q And did it contain anything?

A Yes. It was all packed to the back with razor blades at that time.

Q What did you do when you arrived?

A Well, we backed up the other trailer and we got it back to back and we started just literally throwing them into the other truck.

Q Did you back the rental truck up to the

Time DC truck, is that correct?

A Right.

Q Who participated in the loading of the Time DC truck?

A Vinnie Santa, Joe DeLuca; maybe myself. Jimmy and Pat Diffilipo.

Q Did you load the rental truck?

A Yes.

Q Both rental trucks?

A At that time we loaded ours full, pulled it on the side and about a quarter of the way on the other truck.

Q You say you loaded your truck; are you referrin to the truck you and Manny Gomez arrived in?

A Yes.

Q You assisted or aided in the loading of the other truck?

A Yes, partially.

Q During the course of loading, how long did it take, Mr. Pollari?

A A couple of hours. To be exact, I couldn't say; maybe two hours.

Q During that period did you speak to anyone other than Vincent Santa and Joe DeLuca, Gomez or the

Diffilipos?

A Well, a phone call came in for Vinnie Santa, it was John.

Q John who?

A John Stabino.

Q And you answered the phone?

A Yes

Q And do you know John Stabino's voice?

A Yes sir.

Q How many phone calls came in from John Stabino?

A Approximately three.

Q While you were present that morning?

A Yes.

Q What happened then as you were loading the second truck?

A When, as we started to load the second truck, it started to get a little late, so we left. Jimmy --

Q Did you have any conversations with anyone before you left that premises?

A Well, I thought I would be with Jimmy Diffilipo on his --

Q Is he a friend of yours

A Yes, he is a friend of mine, and I thought, you know, I'd be with him but he was going to CBS and Vinnie

Santa said he was going to CBS too and I was to proceed to S&F.

Q What is S&F?

A It's a warehouse on Flushing Avenue near the Navy Yard.

Q And what is CBS?

A CBS is another warehouse that's, you know, it's the same thing, a tall building.

Q Who told you you were going to S&F that morning on this March 12, 1975 date?

A Vinnie Santo.

THE CLERK: Document marked as Government's Exhibit 10 for identification.

MR. CORCORAN: Thank you.

Q I show you Government's Exhibit 10 marked for identification, and ask you: if you can identify that, Mr. Pollari?

A Yes. This is given to me by Jimmy and that is about five minutes before we left. Where we had to go, he told me to give this to the man at the gate.

Q Before you left the Zimco lot with the lot of Schick products?

A Yes, with what I had on my truck.

Q Did Mr. Santa tell you where Diffilipo was going that morning, March 12, 1975?

A Yes. He said he was going to CBS.

MR. YOUTT: Objection.

THE COURT: On what grounds?

MR. YOUTT: Hearsay.

THE COURT: In every criminal case evidence is admissible against an accused only for what the particular accused said or did not. What someone else said or did, a man is responsible under our system for what he does, he can't be responsible for what someone else does.

The exception to that is where a conspiracy is charged. A conspiracy has been described as a kind of partnership for criminal purposes. All of the parties are partners and instead of calling them partners, they are called conspirators. Instead of calling it a partnership it's called a conspiracy.

It's very much like a legitimate partnership. In a legitimate partnership where you have two or more persons in a legitimate business, if one partner does something or says something during the term of the partnership and to carry out the purpose of the partnership, it binds all of the other partners, all are liable. So for example, if wehad a clothing store with three partners, let's assume one of them was a salesman, the other the cashier, and the third partner is a man who bought the merchandise, let's assume the man who is commissioned to buy the merchandise bought more merchandise than the other partners wanted to, buy different styles than the other partners wanted to buy, and they may be different price lines.

The partnership would, nevertheless, be liable for that purchase because it was made during the partnership and for the purposes of the partnership, because each partner becomes the agent for all the other partners for the partnership's purpose and, as long as the partnership exists, and so carrying that over to a criminal conspiracy, it's the same thing. Every member of the conspiracy is chargeable with everything that's said by another conspirator during the term of the conspiracy, and if the statement or transaction is for the purpose of advancing the conspiracy objective.

In this case it was the conspiracy to possess, receive and possess the stolen merchandise. The problem is, first, determining whether the accused is a member of the conspiracy. The defendants cannot in no way be affected by what Mr. Santa said or by what Mr. Diffilipo said or what anybody else said.

Now, this witness is about to testify, or did say, that somebody said that the load was going to CBS. That can't bind any of these defendants because they weren't there, they didn't say it, unless you find beyond a reasonable doubt that the conspiracy charged in the indictment is established, that the person who made the statement or engaged in the discussions was a member of that conspiracy, and that the statement was made during the term of the conspiracy and for the purpose of the conspiracy, purpose of receiving or storing the merchandise.

And, if you find all that is established, then if the Government proves beyond a reasonable doubt that the accused, and I used the accused in the same, both singular and plural, knowingly and willfully entered into that conspiracy, in other words the Government must prove beyond a reasonable doubt that the accused, to be charged with a conversation that was conducted outside his presence, knowingly and willfully became a member of the conspiracy, that the accused to be charged was aware that his activities brought him into the conspiracy, was aware that the conspiracy was for the purposes of receiving and storing and possessing stolen merchandise, and knowing that, that the accused deliberately and voluntarily entered into that conspiracy.

In other words, as an intentional act and not just a negligent act or an inadvertent act. He is being charged with a crime as part of a crime, an element of a crime is what we call mens rea, criminal intent. You can't charge anyone with a crime unless the evidence shows that you may charge them with a crime, but the crime ins't proven unless the evidence shows beyond a reasonable doubt that what the accused did, he did knowingly, that he was aware of it and intentionally knew what he did, he did intentionally knowing that what he was doing was unlawful.

Is that satisfactory?

MR. YOUTT: May I be heard on that, your Honor?

THE COURT: The Jury may be excused.

(The Jury was excused from the courtroom.)

THE COURT: I might say it is hearsay, but it's permissible hearsay.

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MR. YOUTT: Your Honor, that's what I was going to get to. My objection to the charge is based upon the first part of the charge, which made the comparison to a partnership.

Your Honor's instruction to the jury on that particular area sounded like an instruction on substantive liability based upon the notion of a traditional partnership. I object, number one, to the comparison and,number two, an instruction on the substantive law on this part, at this point in the trial, and number three, in that I don't think I would contend that the instruction did not elucidate the nature of the conspiracy except to the hearsay rule.

In other words, focus upon the use of the statement that the witness has uttered as to the destination of the goods as being accepted as the hearsay rule which does not necessarily bind these defendants but may be used as evidence when hearsay otherwise may not be used in light of the conspiracy allegations, and, my further objection, would request that the Court additionally instruct the jury that they may consider the statement subject to some final connection of the conspiracy.

I would contend that the instruction as presently existing does not set that forth and it may be interpreted as an implied ruling, by this Court that the conspiracy has been established already.

THE COURT: All right, Mr. Youtt, I'd appreciate your telling me the language you want me to use for the jury and I'll give it to them word for word. If I agree with it, you tell me what I should tell the jury.

MR. YOUTT: Your Honor, I would propose that you instruct the jury that hearsay evidence, in other words the statement by a person who was not present, or a statement, the report by a person who was not present of what another person said concerning a fact is not admissible, it is hearsay. There are exceptions to the hearsay rule.

Among the exceptions are certain statements made during the course of and in furtherance of the conspiracy. If the jury is able to conclude from all of the evidence that the Government proves beyond a reasonable doubt that the defendants in this case were members of the conspiracy charged to have and possess stolen merchandise, and if they believe, if they conclude that the statements made by Mr. Santa to which this witness has just testified were made as a part of, during the course of and in furtherance of that conspiracy, then they may accept those statements from this witness and give to them whatever value they may give to this witness' testimony as credible evidence.

THE COURT: Well, I thought I might give a more favorable instruction, but if you are satisfied with that, I'll have the reporter read it word for word, and say, "I so instruct you."

Seat the jury.

(The jury is in the jury box.)

THE COURT: I ask you to disregard the example I gave you in instructing you on the use of the testimony of a statement made outside of the hearing of the accused, and disregard the analogy I gave you about a legitimate partnership, and I want you to listen to what the reporter has to say on the question of the admissibility of this evidence, and I so instruct you.

Go ahead, Mr. Klimaszewski.

(The reporter read back the requested passage.)

THE COURT: You may proceed.

(continued next page)

Pollari-direct

Q I believe you stated, Mr. Pollari, that your truck was loaded, right, but you aided in the loading of the other rented trucks; is that correct?

A Yes.

Q And, at some point you were instructed to take a portion of the goods to S&F warehouse; is that correct?

A Yes.

Q Did anyone indicate to you where Jimmy Diffilipo was going on the other rented truck?

A Vinnie Santa said that Jimmy was going to CBS.

Q CBS; did he indicate where CBS was located?

A 50th Street.

THE COURT: You understand that that statement is not chargeable against any of the accused unless and until the Government proves beyond a reasonable doubt that the conspiracy as charged in the indictment existed, and two, that the individual that made that statement knowingly and willfully became a member of that conspiracy, and three, that the statement is made during the term of the conspiracy and to further the objectives of the conspiracy and then is admissible only if and when the Government proves beyond a reasonable doubt that the accused knowingly and willfully became a member of the conspiracy.

Now, in order to prove that the defendant knowingly and willfully became a member of the conspiracy, it must be based on the evidence of what the defendants or the accused said or did, not on what a third party testified to as to an accused's activity.

In other words, the mere fact that Mr. Santa said that the load or part of the load is going to CBS is not the kind of evidence that would bring the accused into the conspiracy. It must be testimony from the witness stand of the witness who said, "I saw the accused do this," or say this, that's the direct evidence upon which you will determine whether or not the Government proves the defendants knowingly and wilfully entered into the conspiracy.

You may continue, Mr. Corcoran.

Q Did there come a time when you left the Zimco lot?

A Yes.

Q On March 12, 1975?

A Yes.

Q You left with the truckload of Schick products; is that correct?

A Yes.

Pollari-direct

Q Where did you take them?

A We went to S&F warehouse, building 77.

Q And would you describe the premises?

A Well, it's a loading dock. It's a big square building, you could load from about four different sides, but building 77, the whole building, different sides to it, 77 is on one side, 88 or 78 is the other side, but we were instructed to go to loading bay 77.

Q Did you have free access to it or did you have to pass through any gates or guards?

A Well, I was given the bill of lading for S&F and I gave that to the man at the front. He accepted it and let us through and instructed us to where building 77 was.

Q And that's the bill of lading you previously referred to as Government's Exhibit 10?

A Yes.

Q What did you do when you arrived at S&F Warehouse on March 12th?

A When we got there there was a man in the booth, outside this booth where they keep warm. He told us to back up. He brought us over some pallets and showed us how to put them on the pallets, I guess so they can count them. And he left.

And there was a hi-lo coming over every once in a while, moving them closer to the wall to get them out of the way, because as we loaded them out the back of the truck, we had no room and this thing was high, so he moved it over to the building.

Q You and Manny Gomez unloaded your rental truck; is that correct?

A Yes.

Q Approximately how long did you take to unload the truck?

A Well, we didn't finish. It got real late, like around 5:30, so we left what we had, what was left on it. We only got three-quarters of the way through, there was about a quarter of what we had left on the truck, and we left with what we had on the truck. We just closed the door and left.

Q You didn't finish unloading this at the S&F Warehouse; is that correct?

A No.

Q Was anyone at the loading dock when you were unloading it, anybody besides yourself and Manny?

A Yes. There was a man, dressed -- he looked just like a regular guy, telling us what to do, telling us how to stack the skids.

Q Did anyone take the Schick products into

S&F while you were there?

A No. They lined them up against the wall.

THE COURT: Did he use skids and pallets; I assume pallets are like a platform made of planks and the hi-lo picks it up from underneath?

THE WITNESS: Right, like a six-inch area where the fork can get in and move it.

Q You indicated you unloaded about three-quarters or the rental truck and you left the premises with a quarter of the Schick products left in the truck?

A That's right, approximately.

Q Where did you go from there?

A Well, from there we went back to the loading at Zimco, and we backed up the other truck up to the Time DC truck and finished filling it.

Q Who was present when you got back to the Zimco lot with the Time DC truck?

A When we got back there was Vinnie Santa and Joe DeLuca.

Q And you indicated that you refilled your truck; is that correct?

A Yes.

Q Did you leave the quarter of the truck load of Schick products in there and filled the rest of the truck?

Pollari-direct

A Yes.

Q Was Jimmy Diffilipo back there?

A No.

Q His brother?

A No.

Q Did you have any conversations with Mr. Santa that evening back at the Time DC truck?

A No.

Q Did he indicate where you were going with the truck?

A Oh, yes. Well, when he gave us instructions to take the truck that we had loaded to Manny's house, because it was late, we couldn't do anything, it was too late, so Manny Gomez parked it in front of his house and he told us we were going to CBS the following morning, and that we should all meet at the Blue Bay Diner.

Q Did he tell you you were taking the truckload that you just loaded to CBS?

A Yes.

Q Including the quarter of the truck that you didn't empty into S&F?

A Yes.

Q Did you convey a report of your activities that day to anyone, Mr. Pollari?

Pollari-direct

A Oh, yes. That evening I called up Agent Pecoraro of the Bureau and told him what was going on.

Q Agent Pecoraro of the FBI?

A Yes.

Q Were you working with Agent Pecoraro at the time?

A Yes.

Q In what capacity, Mr. Pollari?

A Informant.

Q How long had you been an informant for Mr. Pecoraro at that time?

A Well, a couple of years.

THE COURT: I might say that when an informant becomes a witness, or I should say it the other way, an informant can never become a member of the conspiracy, so his statements can in no way bind the members of the conspiracy because he isn't a member.

So, when Mr. Pollari says he is an informant, it means that his statements cannot be chargeable against the accused of anything what someone else said but might be under the conditions that I indicated.

MR. CORCORAN: Your Honor, referring to his statement during the course of these activities, as opposed to his statements from the stand.

THE COURT: Or statements from the stand, in testimony. So, what I'm only talking about is the statements he made during the course of the conspiracy, in the conspiratorial business, if you find such to be the case.

Q Did you, in fact, meet at the Blue Bay Diner the next day?

A Yes.

Q And who was present at the diner the next morning, that would be March 13th, would it not?

A Yes.

Q Who was present at the diner?

A Manny Gomez, myself, Jimmy and Patty Diffilipo.

Q And from the diner, where did you, yourself, go?

A We went to CBS.

Q Who, you and who else?

A Me and Manny Gomez and the truck.

Q And that is the truck which you loaded from the Time DC truck the night before?

A Yes.

Q Would you tell the Court and jury what occurred when you got to the CBS Warehouse on March 13, 1975?

A Well, when we got to the place it was full, so we parked the truck diagonally out of the way on the side.

Three men came out, looked to see what was in the truck, and we had room after one truck pulled out we pulled in and started to proceed to unload it. They showed, they gave us skids and showed us how to stack them up so they wouldn't fall when you stacked them up.

Q Would you look around the court and tell the jury whether you see any of these three men in the courtroom today?

A Yes.

Q Would you indicate who they are?

A Those men over there.

MR. CORCORAN: Your Honor, indicating the defendants.

THE COURT: Excuse me. Would you please read that back to me, Mr. Klimaszewski?

(The reporter read back the requested question.)

THE COURT: Would you please point out who you mean by "those men?"

THE WITNESS: Well, one man I know his name is Moische.

THE COURT: Who is that?

THE WITNESS: The man sitting at the head of the table.

THE COURT: Would you please stand?

(The defendant rises.)

THE COURT: Mr. Mor Wercberger, is that the man you pointed out?

THE WITNESS: Yes.

THE COURT: Let the record show that the witness pointed out the defendant Mor Wercberger. You may be seated. And the other?

THE WITNESS: I know there were three, but I don't know their names.

THE COURT: Would the other two stand?

(The two defendants stood.)

THE COURT: Are those the other two gentlemen whom you say were there at the time?

THE WITNESS: Yes, your Honor.

THE COURT: Let the record show that the witness pointed out the defendants Chiam Kahan, who is seated between Solomon Wercberger and Mor Wercberger, and the defendant Solomon Wercberger.

You may proceed.

Q What exactly occurred when you arrived there and Mr. Kahan and Mr. Wercberger and Mr. Wercberger came out to the dock?

A Well, they came and instructed us as to how to stack, because I imagine for the count, or just stacked them. Anyway, when you lifted them up they fall down, so there was a way you had to stack to straight, so standing up, you know, so that it would be stable, a certain way and they showed us how to do it.

Q Did Mr. Santa give you any paperwork to give to CBS Warehouse on the 13th of March?

A No, not me.

Q Could you explain what occurred then when you were out there?

A Well, we unloaded. We started unloading them on skids and a hi-lo driver came over and started bringing them into the warehouse.

Q Were there any other people on the dock at the time?

A Yes. There were a lot of people on the dock at the time, but these, those men were the only men that had anything to do with me.

Q Were there other trucks being unloaded at the time?

A Yes, there were other trucks being unloaded.

Q How many elevators were there going upstairs?

A I think there were two.

THE CLERK: Two photographs marked Government's Exhibits 11 and 11-A for identification.

Q I show you Government's Exhibits 11 and 11-A marked for identification, and ask you: if you can identify what is depicted on those photographs?

A Yes, this is where I was. Yes, yes.

Q And what is it, sir?

A This is the warehouse and this is the loading bay.

Q What warehouse is that?

A Oh, CBS.

Q And you indicated you were unloading goods from your truck into that warehouse; is that correct?

A Well, unto pallets and they were taking them away and putting them on the elevator.

Q Who was taking them away?

A I don't recall.

Q What kind of goods were being taken from your truck into the CBS Warehouse?

A Razor blades.

Q Do you recall the make?

A Schick.

Q When you and Mr. Gomez arrived in the truck did anyone else arrive in the morning of March 13th?

A Yes. But, I don't know, I guess about 15 minutes to a half-hour later, Jimmy Diffilipo and Patty Diffilipo followed up with two vans that were filled with the various Schick products also.

When there was room for them, they pulled up. They were given the same instructions as everyone else, and we did what we had to do, we unloaded them.

MR. CORCORAN: Please mark this as Exhibit 4, 4-A, B, C, D, E, F, G and H.

THE CLERK: Nine photographs marked as Government Exhibits 4, 4-A through 4-H, inclusive, for identification.

Q Mr. Pollari, would you examine the photographs marked as Government's Exhibit 4, 4-A through 4-H?

A Yes, this is the stuff.

Q Is that what is depicted in those photographs, does that appear similar to those products which you emptied into the CBS Warehouse?

A This is the stuff that was on the Time DC truck.

Q Would you examine Government's Exhibits 8 and 8-A in evidence?

A This is the truck, yes.

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Pollari-direct

Q How can you identify that as the truck, sir; are you referring to the Time DC truck in which you took the Schick products on March 12th and 13th 1975?

A Yes. I know this is the Time DC truck because this is the one that we helped rip off the signs that said "Time DC."

Q Which signs are they, sir?

A The ones up close to the front, other one on other side.

Q There were signs, "Time DC" on that vehicle before you ripped them off; is that correct?

A Yes.

Q Any Time DC signs remaining on that vehicle?

A Yes, one in the back.

Q Did you attempt to rip that off?

A Couldn't get it off. It was --

Q Did you make that effort by yourself, sir?

A No. Vinnie Santa helped me all the way around.

Q Mr. Santa helped you to rip the signs off?

A Yes.

Q Where did that activity take place?

A At the trailer yard, at Zimco.

Q So it was goods from the trailer at Zimco that you unloaded at the CBS Warehouse on March 13, 1975; is that correct?

A Yes sir.

Q Did there come a time when your rental truck was emptied on March 13th?

A Yes.

Q What occurred at that time?

A Well, at that time I started to help Jimmy and Patty Diffilipo empty the vans. They pulled the vans up, so I started helping them and Manny Gomez left with the truck that was empty,and I stayed with them, with Jimmy and Patty Diffilipo to help them unload what was on their truck.

Q Were those goods also unloaded into the CBS Warehouse?'

A Yes.

Q Was the defendants Mr. Wercberger, Mr. Kahan and Mr. Wercberger present when the trucks and van were unloaded into the CBS Warehouse?

A The two vans, yes.

Q And did there come a time when you finished unloading all of the Schick products into the warehouse on the 13th?

A Yes.

Q About what time was that?

A Oh, it [illegible] three or four o'clock.

Q What [illegible] do at that time?

A You mean later?

Q What did you do at that time?

A At that point I got in the truck with Jimmy, Manny Gomez had already left with the big truck, and we went to bring the vans back.

Q Where did you take them?

A Well, there was a U-Haul van that we took, I don't recall the exact address, but it was near Zimco and we brought them one back. We all got in the Hertz truck and went to Tony's Gulf to drop that one off.

We dropped that one off and then we got back to the car and went back to Tommy Reel's house.

Q Who is Tommy Reel?

A He's an associate of Vinnie Santa.

Q Where is Tommy Reel's house located, Mr. Pollari?

A On Lefferts Boulevard and Linden Boulevard, near Roberts Lounge.

Q Approximately how long did it take you to get from CBS Warehouse, drop the trucks off and get back to Tommy Reel's house?

A Well, like I said, we had a little bit of time, so I'd say maybe an hour and a half, maybe more.

MR. CORCORAN: Mark these, please.

THE CLERK: Photographs marked as Government's Exhibit 12 for identification.

Q Mr. Pollari, I show you Government's Exhibit 12 marked for identification and ask you if you can identify that which is depicted in those photographs?

A Yes. It's the house, yes, this is the house, the one on the right.

Q What house?

A There's two new ones here, the one towards the right.

Q Tommy Reel's house?

A The one with the garage doors is Tommy Reel's house.

Q Could you put your initials on the photograph where the house is that you are referring to?

(The photograph was marked by the witness.)

Q Now, you returned to this house with whom, sir?

A With Patty Diffilipo, Jimmy Diffilipo and myself.

Q And when you arrived, what part of the house did you go into?

A There's a card room, they used the card room in the front and we went -- it's right off to the right. You go in the house and it's right there.

Q People play cards there?

A Yes.

Q Who was present when you arrived?

A Tommy Reel was there, Joe DeLuca, John Stabino and Vinnie Santa.

Q This is approximately an hour or an hour and a half after you left the CBS Warehouse?

A Approximately.

Q Did you have any conversation with Mr. Santa at that time?

A Yes. I walked up to him and he said that the FBI had hit the place, CBS, ten minutes after we left. And, I asked him if we had anything to worry about.

He said, "We have nothing to worry about, it's on their end." And --

Q Did Mr. Santa know at the time you were an FBI informant?

A No.

Q You never disclosed that to him?

A No.

Q Anything else happen at the house at that time?

A And he handed us $700 apiece.

A That's correct.

Q Approximately what time did you begin your surveillance?

A Well, we arrived in the general area of the CBS Warehouse at approximately 9 or 9:15 A,M., and searched the area for an appropriate surveillance vantage point, and the actual surveillance of the warehouse didn't take place until about 10:30 A.M.

Q Were you alone or with other agents?

A I was with other agents.

Q Who were you with?

A Agent Robert Pecoraro.

Q Where, specifically, did you set up your surveillance?

A It was on the second floor of the large building which is adjacent to the CBS Warehouse, and it was at least the first floor, was utilized by the United States Mine Corps as a reserve office.

Q What were you able to see from your vantage point on the second floor?

A I was able to observe the entire parking lot area in front of the CBS Warehouse, the platform, trucks in front of it and people on the platform.

Q Beginning at 10:30 A.M., you were able to observe that premises; is that correct?

A That's correct.

Q And were the premises -- was there any traffic or people on the platform at the time?

A Yes.

Q Much traffic; how would you characterize it?

A Considerable.

Q How would you describe it?

A There were three or four trucks coming and going, merchandise loaded and unloaded.

Q What if anything did you observe that morning beyond that?

A I don't --

Q Well, approximately, at 11:45 A.M. on March 13th, what did you observe at the CBS Warehouse?

A Okay.

At about 11:45 A.M. on the 13th, a 2o-foot Hertz straight truck, a yellow truck arrived. We were able to see the license, the New York license which was 1A39HC. This truck pulled into the parking lot, parked with its back to us. The driver got out and another individual that was with him got out.

(continued next page)

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Q Were you able to identify the two individuals?

A They were identified by my fellow agent as one Emanuel Gomez and one Paul Polari.

THE COURT: When you say straight truck, you want to distinguish that from the trailer truck type of truck where you have two separate parts for it?

THE WITNESS: Yes, your Honor.

THE COURT: All right, I just wanted the jury to know what you meant by --

THE WITNESS: A straight truck is one complete truck, you've a cab and box attached to it, it doesn't detach as a tractor trailer would.

Q What, if anything, did you observe the two individuals, Mr. Gomez and Mr. Polari, do at that time?

A I'm not quite sure Mr. Polari got out of the truck at that time, but I'm sure Mr. Gomez did and went to the platform. He spoke briefly with an individual we later identified as Jacob Fisher, one of the ones we had seen working on the platform.

F went into the front of the CBS Warehouse, we couldn't see him and approximately five minutes later a Mr. Mor Wercberger came down and spoke to Gomez.

Q Did you see that individual in the courtroom today?

A Yes, I do.

Q Could you indicate who he is?

A He's the gentleman on the left at the defense table.

THE COURT: Let the record show that the witness pointed to the defendant Mor Wercberger.

Q What happened then, Mr. --

A There was a brief conversation. Mr. Gomez went back to the truck, backed the truck up to the platform. Mr. Polari got out and subsequently, they began unloading cartons onto the platform.

Q What, if anything, did you observe after that?

A Some time shortly after that, Mr. Chiam Kahan came down and Mr. Solomon Wercberger came down, and all three participated in some form or another in the offloading of the merchandise. I can remember specifically Mr. Wercberger drove the fork lift.

Q Which one, Mr. Wercberger?

A Mr. Mor Wercberger drove the fork lift; the others were pretty much involved with arrangements of pallets to contain or at least to stack the shipped products on top of.

Q Were there any other trucks going into the CBS Warehouse at that time?

A No, there was not.

Q Was there any other product or parcels on the loading dock at the time?

A No, there was not.

Q Did you observe any other vehicle arriving at the CBS Warehouse on March 13, 1975?

A Yes. Shortly after noon two other trucks arrived, one a U-Haul Van and a van is a smaller type of truck, much like a Volkswagen bus, except it's contained with no windows, and U-Haul Van and Hertz Van. They parked, pulled into the parking lot.

Q About what time was that, Agent Dowd?

A Shortly after noon, 12:00 O'clock.

Okay, they pulled in and they, these two drivers were identified by my partner as a Mr. James Diffilipo and a Mr. Patty Diffilipo.

About the time that they arrived, Mr. Mor Wercberger, Mr. Chiam Kahan and Mr. Solomon Wercberger went over to these two vans. I can remember Mr. Wercberger opening the passenger door of one of the vans looking inside toward the back and the other two went to the back of the two vehicles and examined the contents.

Q Did there come a time when those were unloaded?

A YEs, it did.

Q Were you able to observe from your observation

Q Who did he hand $700 to?

A He handed $700 to me, $700 to Jimmy Diffilipo, and $700 to Patty Diffilipo.

Q Was that payment for your services in unloading the truck?

A Yes.

Q Prior to March 12, 1975 when you gave this information to Agent Pecoraro, had you ever been paid for your informant services?

A Yes.

Q Approximately how much, prior to that date?

A About $280.

Q Did you expect any money as a result of the information you turned over on March 12th?

A No, no.

Q Did you, in fact, receive any payment from the FBI or anyone else for that information?

A Yes.

Q Afterward?

A Yes.

Q Approximately how much did you receive?

A $5,000 for my services from the Bureau.

Q And any money from anyone else?

A No.

Pollari-direct

Q Did you receive any money from any insurance company?

A Oh, yes.

Q How much?

A I received four -- it was much later, $4,000/ from one insurance company and $4,000 from another.

Q Did you have any expectation of receiving any of those funds prior to March 12, 1975?

A No, I had no idea.

THE COURT: What did you do with the $700 that you received from Mr. Santa; was it $700?

THE WITNESS: Yes.

THE COURT: What did you do with it?

THE WITNESS: I wasn't working then, I was working for --

THE COURT: So, you kept it?

THE WITNESS: Yes.

THE COURT: All right.

MR. CORCORAN: At this time, your Honor, I offer in evidence subject to connection, the Government's Exhibits 4 and 4-A through 4-G, 4-H.

THE COURT: Show them all to Mr. Youtt.

MR. CORCORAN: And Government's Exhibits 9, 10, 11 and 12.

THE COURT: You may step down, we will call a short recess and you can come back in five or ten minutes.

Any objection to the exhibits, Mr. Youtt?

MR. YOUTT: I would like to review them during the recess, if I may, your Honor.

THE COURT: Okay, we'll take a short recess and I expect we will reconvene again at 3:00 o'clock promptly.

(A short recess was held.)

THE COURT: Any objection?

MR. YOUTT: No objection, your Honor.

THE COURT: You will say that in front of the jury.

MR. YOUTT: All right.

(The jury is in the jury box.)

THE COURT: Any objection, Mr. Youtt?

MR. YOUTT: I have no objection to the introduction of the photographs.

THE COURT: Then let them be marked.

THE CLERK: As Government's Exhibits 9, 10, 11, 11-A, 4 through 4-H and all of which have been previously marked for identification are now marked in evidence.

THE COURT: Cross-examination?

MR. YOUTT: I have no cross-examination on this witness.

THE COURT: You may step down, thank you.

* * *

point, the second floor of the adjacent building, what was beint taken straight from the truck that arrived at 11:45 and the two vans that arrived shortly after noon?

A There were numerous kinds of Schick products, there were several different types, several different sizes of boxes, and they all contained I would say about four or five different numbers upon the outside of the box.

Q Approximately how long did this unloading take?

A I would say the whole operation lasted about three and a half hours.

Q Now, during the period you observed Mr. Wercberge

A Yes, I did.

Q During approximately how much of that time was he on the loading platform?

A Mor in the beginning, I'd say maybe an hour in the beginning and then sporadically, a few minutes here and there throughout the rest of the afternoon.

Q And Mr. Chiam Kahan?

A About the same. I do recall that Mr. Solomon Wercberger departed shortly after the two vans arrived, and we obtained his license number and a description of the car that he departed in with another individual who I cannot identify.

Q Approximately what time did the unloading --

was the unloading completed?

A I would say to the best of my recollection, about about 3:30, 4:00 o'clock, somewhere in that neighborhood.

Q What, if anything, did you do then after 4:00 o'clock, or shortly thereafter?

A Well, when the search warrant arrived with Agent Patrick Colgan and myself, and seven other agents, went to the platform area of CBS Warehouse.

Q Did you have a Federal Search Warrant at that time?

A Yes, we did.

Q What did you do when you arrived?

A We, Jacob Fisher was the only one on the platform at the time. We told him that we wanted to see Mr. Wercberger, Mor Wercberger and he called upstairs; there was a delay of five or ten minutes and, we ultimately went up on the fourth floor of the warehouse.

Q Did you encounter any of the defendants on the fourth floor?

A Yes.

Q Who was present?

A Mr. Chiam Kahan, Mr. Mor Wercberger and there was an office manager, I believe his name was Bill Friedman.

THE COURT: Officers of the CBS Warehouse on the fourth floor?

THE WITNESS: All of them, your Honor.

THE COURT: Yes, but --

THE WITNESS: No, Mr. Solomon Wercberger was not there.

THE COURT: No, I'm talking about the offices of CBS warehouse.

THE WITNESS: I see.

THE COURT: Is that where their bookkeeping, clerical work?

THE WITNESS: Yes, your Honor.

Q Mr. Chiam Kahan, Mr. Mor Wercberger were on the fourth floor, and were they in the vicinity of their offices?

A Yes.

Q Could you describe the fourth floor?

A It's a large, typical warehouse; a lot of floor space with thousands and thousands of different types of cartons and products housed in there. And, a small office space straight ahead, as you come off the elevator, approximately 20 to 30 feet, I guess, from the front of the elevator.

Q Now, did you execute the search warrant that you had at that time?

THE COURT: Next witness.

MR. CORCORAN: The Government calls Agent Don Dowd.

THE COURT: Is he in the witness room?

MR. CORCORAN: I believe he is, your Honor.

DONALD DOWD, having been called as a witness, being duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: Please state your name and spell it for the record, please.

THE WITNESS: Donald E. Dowd, D-o-w-d.

THE COURT: Please be seated.

DIRECT EXAMINATION

BY MR. CORCORAN:

Q Mr. Dowd, by whom are you employed?

A I'm a Special Agent for the Federal Bureau of Investigation.

Q How long have you been so employed?

A Eight years.

Q Where are you presently stationed?

A In New Rochelle, New York.

Q And where were you stationed in March of 1975?

A Manhattan office of the FBI.

Q And were you assigned to any particular squad at that time?

A Yes, I was.

Q What squad is that?

A Truck hijacking squad.

Q Calling your attention to March 13, 1975, were you working on that day?

A Yes, I was.

Q And what was your assignment?

A I was part of a surveillance team involving a load of stolen Schick products.

Q And did you set up a surveillance on a particular place?

A Yes, I did.

Q What place was that?

A It was a building on 51st Street near First Avenue, in Brooklyn, New York.

Q I show you Government's exhibits 11 and 11-A in evidence and ask you if you can identify that building?

A Yes, I can. It's the CBS Warehouse, which is at the foot of 50th Street and First Avenue, Brooklyn, New York.

Q And have you seen that building previously?

A Yes, I have.

Q Is that the building you were on surveillance, for which you were surveilling on March 13, 1975?

A Yes.

Q And what were you looking for?

A Schick products bearing specific serial numbers.

Q And did you find those products?

A Yes, we did.

Q Where?

A Most of it was located in the center aisle to our left, but there was a lot of it further back to your left, on both sides of the aisle.

Q And were you able to identify these Schick Products that you found to the theft that you were investigatin

A Yes, I was.

Q Approximately how many cartons of the Schick Products did you find in the CBS warehouse on March 13th, 1975?

A About 5,072.

Q I show you Government's Exhibit 4A through 4F, and ask you: If you can identify those photographs?

A Yes. These are the cartons as we saw them on that day and the numbers, as I recall, are the same numbers that I had on a list that I had previously received from information from the company.

Q Did those photographs, were they in fact, taken at the CBS Warehouse on that day?

A Yes, they were.

Q Did you have occasion to speak to either, or any of the defendants after executing that search warrant?

A Yes, I did.

Q Who did you speak to ?

A Well, myself and Patrick, Pat Colgan first encountered Mr. Mor Wercberger and Mr. Chiam Kahan in their office; they were both verbally advised of their rights and provided with a form stating those same rights. That took place at approximately 5:00 o'clock.

We began an interview with Mr. Wercberger, again, and Mr. Kahan had quite a bit to say, though we had another agent take him outside and he spoke with him at that time. Later on, I, myself, interviewed Mr. Kahan in the office.

Q And what did you say to Mr. Kahan and what did he say to you?

A After he was advised of his rights, he, and he read the statements, he indicated that he did not wish to sign the statement but he would agree to be interviewed, and I asked him, well, I told him that since the Federal Search Warrant had been served and we had located the items that we were looking for, I wanted to know the origin of the cartons and any of the details surrounding those cartons.

He told me that the previous day, being March 12, 1975, a 20 foot, 18 or 20 foot straight truck, Hertz truck had arrived and, approximately, he said, exactly, he said 1,673 cartons had been received. I asked him if he had the appropriate documentation for that and he said he did.

He provided a copy of the receipt to the driver. I asked him if he could identify the individuals that delivere the merchandise, he said he could not, and I asked him, "Do you know what company they were from?" And he said, "No", but Mor Wercberger told me they were from International Trading Company, of which company he was not familiar with and had not done business with previously.

THE COURT: Now, who did you have that talk with?

THE WITNESS: This is with Mr. Chiam Kahan, your Honor.

THE COURT: Now, if you believe Mr. Dowd's testimony and you find that the statements are chargeable against Mr. Kahan, they're chargeable only against Mr. Kahan and not against either of the other accused; these are statements made after the alleged crime had been committed and the statement to be attributable only to the one making it.

MR. CORCORAN: Your Honor, may we discuss that?

THE COURT: Yes, at some future time.
Continue.

Q Did you have any further conversation with Mr. Chiam Kahan at that time?

A Yes. I asked him what was the normal course of business in which he received merchandise at the company, and he said number one, well, to state it simply I asked him how does he obtain business for his company? He said number one, he advertises in the yellow pages, number two, his company contacts customers direct, and number three, he said that sometimes truckers come in off of the street and request that their merchandise be stored.

Q Did he indicate how he got the particular business that came in on March 12th and March 13th?

A He said it came in off the street.

Q Did you have any conversation with the defendant, Mor Wercberger on the 13th after executing that search warrant?

A Yes. I was present with Mr. Colgan when he interviewed him.

THE CLERK: Government's Exhibit 13 for identification.

Q Mr. Dowd, I show you a document marked Government's Exhibit 13 for identification, and ask you if you can identify that document, sir?

A Yes, I can. This is a document that was found in Mr. Mor Wercberger's wallet after we had contacted the United States Attorney's Office here and obtained authorization to arrest him. This is taken from his person, subsequent to his arrest, it also bears my initials and the date.

Q And in the lower right-hand corner?

A That's correct.

Q What does that document contain, sir?

A The front of it, in print, is the name and address of a company, Teresa Merchandising Company, importers of general merchandise, and address of 41 Union Square West, New York, New York, and it says -- there is no date on it, it says, "To stop and shop".

The left-hand column there are a series of numbers, first one being 500. It says "Arrid Cream, Arrid Roll-on," and various other descriptions of toiletries.

On the reverse, there is a number 36/4A's, Schick Twin Injector and the number 891.

Q Is that in fact a list of Schick products and cartons, sir?

A Yes, it is.

Q And do those products and cartons correspond to the stolen goods you were looking for?

A Yes.

Q And where was that particular document found?

A In Mr. Mor Wercberger's wallet, folded up in his wallet.

Q That was March 13th; is that correct?

A That's correct.

Q Mr. Chiam Kahan or Mr. Mor Wercberger indicate to you, their position with CBS Warehouse?

A Yes. Mr. Chiam Kahan told me he was the president of the company. He told me that Mr. Mor Wercberger was the treasurer of the company and that Mr. Solomon Wercberger was the Secretary of the company, which was incoporated in 1973, as I recall.

Q Mr. Chiam Kahan was unable to tell you the source of these goods that were found in his warehouse; is that correct?

A No, that's not correct. It's correct as far as what transpired on the 12th. On the 13th, he said that the 3,032 cartons for which he had no documentation for arrived in a Hertz truck and two vans.

Q And did he identify the consignor of that?

A He said it was International Trading.

MR. CORCORAN: Thank you, I have no further questions.

I do have a question on the 3500 material.

THE COURT: The jury is excused for the moment.

(Jury excused.)

THE COURT: What's the theory; that exculpatory statements made by one defendant is admissible against the others?

MR. CORCORAN: These were not both conspiracy statements. In fact, this conspiracy continued for some time.

The statements that were made, were made in the nature of exculpatory statements as to the group, that they were made at a time when these defendants were not under arrest and, moreover, the Government evidence will show that the defendant continued to have meetings with the other co-conspirators some weeks later.

THE COURT: The exculpatory statements had nothing to do in advancing the business of the conspiracy, did it? I'm not speaking of the documents themselves, but his statements as to what they meant, or his statement as to what they are supposed to show, a consent of guilt; isn't that what the idea is?

MR. CORCORAN: The statement that Chiam Kahan made with reference to this particular load, would indicate that this load in the ordinary course of the business, he had nothing to do with it, he'll have to see Mr. Mor Wercberger, I don't know anything about it. Mr. Mor Wercberger then indicates by showing these documents that we have lawful possessorship.

THE COURT: I'm talking only of the exculpatory statements by Mr. Kahan; how can they be attributable to the evidence? It's my understanding that their introduced to show a connection of guilt, and that is subjective thing, isn't it?

MR. CORCORAN: With regard to that, I agree. But what I want to raise is the fact that your Honor indicate to the jury that the conspiracy had been completed, and I don't agree with that.

THE COURT: I didn't say that.

MR. CORCORAN: I thought you had.

THE COURT: I said the crime was completed, yes.

MR. CORCORAN: I don't believe the crime was completed since the conspiracy is charged and our evidence --

THE COURT: I wasn't thinking of post-conspiratorial statements, at all, because even if the documents were delivered after the conspiracy, of course, that's chargeable against all, it's a post-conspiratorial acts that if the conspiracy was complete but his statements that evidence some subjective --

MR. CORCORAN: I agree with that.

THE COURT: -- feelings, it can't be attributable to the others, that is the thought I was trying to get across.

MR. CORCORAN: I agree with that, your Honor.

THE COURT: All right, they can be marked.

THE CLERK: I'm going to now --

MR. CORCORAN: Your Honor, I ordinarily would have time to look this over earlier, I didn't anticipate Mr. Polari being as brief a witness as he was.

THE CLERK: A two-page report marked Government's Exhibit 3500-6, Grand Jury minutes of Special Agent Dowd dated January 14, 1977 marked Government's Exhibit 3500-7, a one-page report dated October 9, 1975, marked Government's Exhibit 3500-8, the Grand Jury minutes of Special Agent Dowd October 16, 1975 marked Government's Exhibit 3500-9, Grand Jury minutes of Special Agent Dowd dated January 14, 1977 marked Government's Exhibit 3500-10, and a one-page report dated October 10, 1975 marked Government's Exhibit 3500-1

THE COURT: Are you ready to proceed Mr. Youtt?

MR. YOUTT: I would like to have a chance to look at these, there are about 35 pages of them.

THE COURT: All right, let us know when you're ready.

THE CLERK: 18 pages of FBI reports 302's marked Government's Exhibit 3500-12.

(Continued on next page)

THE COURT: Mr. Youtt.

MR. YOUTT: Thank you.

THE COURT: Are you ready?

MR. YOUTT: Yes, thank you.

THE COURT: Seat the jury.

(Jury entered courtroom.)

CROSS-EXAMINATION

BY MR. YOUTT:

Q Agent Dowd, between the time that the unloading was completed on March 13, 1975 and the time that you and your fellow agents went in to execute the search warrant, did you remain in your surveillance position?

A No, sir, I did not.

Q When did you go?

A Well, I was up and down the stairs making telephone calls for one. Later on in the afternoon, I'd say around 2:00 p.m., I went down to the, like a wall between the building; I was in the CBS Platform, I think there is a railroad track and we had seen a sanitation trucks going through there, and I was down in this area to get a little bit closer.

Q When you sa there is a wall between the building you were in and the CBS platform, is it just a standing wall or is it a wall of a building or --

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A No, it's just a standing wall, at least that's what it was in 1975.

Q Did it obstruct your vision or view in any way?

A No, it did not.

Q It didn't obstruct your view because of what, it was low?

A It was lower than I was, yes.

Q You were on the second floor of a marine recruiting building; is that your testimony?

A I believe the marine reservist building.

Q I see. And about how far from the loading area of the CBS warehouse was the marine reserve building?

A Fifty paces.

Q Fifty of your paces?

A No, another agent's paces.

THE COURT: Do you understand this to be the area of an old army base?

THE WITNESS: I really don't remember that, whether it was, your Honor.

THE COURT: You don't remember? All right.

THE WITNESS: It's, most of the building was abandoned though.

Q Now, is the position where you are making your surveillance directly at the front of the loading platform area or off to a side?

A Off to the side.

Q In other words, it's a building which is next door were down the road from the CBS warehouse?

A I would say next door.

Q All right, now. How far -- strike that.

When you were in your position of surveillance, how did you come and go without being detected by others?

A Well, you couldn't see, we're on the -- that building was located I believe south of the CBS building. In other words, as you are facing CBS, that building is on the left, so you can go out on 51st St. and nobody can see you from the other side of the street.

Q When you were making your observations from that point, were you using binoculars or any visual assistance devices?

A Yes, I was.

Q And with those binoculars you were able to identify then the unloading of the specific Schick product; is that correct?

A Well, I was only able to read the word "Schick" which was the reason I later, around two o'clock, went down to the sea wall just to see exactly what the numbers were.

Q And when you say "sea wall" is that what you referred to --

A I call it a sea wall, for lack of a better word.

Q Is there a body of water nearby?

A Well, to the -- further down, further east or west, actually, I believe, there is a body of water, yes.

Q But the wall, itself, is nowhere near the body of water?

A No.

Q When you went to that sea wall, you went to be able to see the off-loaded cartons better?

A That's correct.

Q And what cartons were you able to observe?

A Well, I don't know exactly which of the numbers, but at least three of the -- well, at least two of the numbers I had on my list.

Q Again, were you using binoculars?

A From there, yes.

Q And did you employ any maneuver to avoid being seen using your binoculars from there?

A Well, I just slipped periodically over the top of the wall and looked at it.

Q How far is the wall, approximately, from the CBS warehouse loading dock?

A I'd say the wall is about, maybe twelve to fifteen feet from the building I was in, so that would have made it about say a hundred and thirty feet.

I take it, then, calculating an agent's pace to be approximately three feet; is that correct?

A That's correct.

Q So the building that you were in was approximately 150 feet, and the wall was approximately 130 feet?

A That's correct.

Q And the wall, I take it, was in a position where you were more able to get a frontal view of the CBS warehouse?

A No. I'm still looking at the platform side of it, the side of the platform.

Q You're still looking down the platform; is that correct?

A That's correct.

Q Now, from your position of surveillance in the second floor, looking out the window, did you look down upon a roof or shelter-type structure with the loading platform?

A Part of it, but more at an angle.

Q Would you describe that, what you mean by "more of an angle"?

A Well, I was more off to the -- I wasn't directly to the side of the platform. I was looking at more or less the corner of the platform. I could see into the garage door area of CBS, as well.

Q But over that area, there is a -- I am handing you now Exhibit 11A in evidence, which is a photograph of the front of the CBS warehouse building.

I ask you if, from that, you can observe a shelter or cover, or roof over the loading dock area?

A Yes, I can. I think there is a better picture of that in close-up.

Q Handing you now what is Government's Exhibit 11 in evidence, is that the photograph you were referring to?

A Yes.

Q This Government's Exhibit 11 looks straight down the loading platform; is that correct?

A That's correct.

Q And at the top of Government's Exhibit 11, you are looking at the ceiling over the roof area that I have described; is that correct?

A Would you restate that?

Q At the top of Government Exhibit 11, you're looking, in effect, at the ceiling over the roof area that I was describing over the loading platform?

A Yes, that's correct.

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Q And would you tell me with respect to Government's Exhibit 11, where you were located; were you located in a position to look as if you see Government's Exhibit 11?

A Well, I would be up in that area, looking here. I could see heads of people on the platform.

Q All right, you were then on the second floor of a building which would be approximately where we're standing, as we're looking at this picture; is that correct?

A Well, it would be more where I'm sitting than this angle.

Q Off to the right angle as we look?

A That's right.

Q As we look at Government's Exhibit 11?

A Yes, that's correct.

Q So, you had a side view of the loading area and you are able to see the heads of people walking, in spite of the roof; is that correct?

A Yes. Well, until they went into this area back here (indicating).

Q Indicating through an entrance door; is that correct?

A Yes.

Q Now approximately how long did you stay in your position of surveillance before you went to the sea wall area, what you call the sea wall?

A About three and a half hours.

Q You stayed in your surveillance position for three and a half hours?

A About that, yes.

Q And then you left your surveillance position to go to the sea wall to observe with your binoculars more closely the goods which were being unloaded?

A Yes, that's correct.

Q Do you recall how long the first truck was in the unloading position before it moved from -- strike that.

Well, as I understand it, first a truck was unloaded and then later, two vans were unloaded; is that correct?

A That's correct.

Q Do you recall how long the truck was in the unloaded position prior to the time of the unloading of the van?

A I could only estimate or guess, really. I'd say maybe about two hours.

Q Okay, and then I take it the other two vans were in a position of another hour and a half to two hours; is that correct?

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A Yes, that's right.

Q Now, during this time, this three and a half to four hours, how many people were engaged in the process of unloading the truck and the vans?

A Do you want a number?

Q The number that you were able to observe, if you can recall that.

A I would say eight.

Q Now, would that be eight people there continuously, or some people coming and going?

A Coming and going.

Q During the time, were any other trucks present in the area?

A Yes, further than the platform there were earlier, but they were moved out to accommodate the Hertz truck

Q Other trucks moved out and then the Hertz truck moved into position; is that correct?

A Yes, that's correct.

Q Do you know who moved those other trucks out?

A No, I couldn't say.

Q Do you know whether it was drivers of those trucks as opposed to employees of the CBS warehouse?

A I couldn't say.

Q When you arrived in the vicinity of the CBS warehouse at about 9:00 or 9:30 on the morning of March 13th, did you know that you were going to be using the marine reserve center for your headquarters at that time?

A No, sir, I did not.

Q When did you make a determination that that would be the position for your surveillance?

A Well, I took quite a while in these buildings, sensitive things to work out.

I'd say we got there around 9:00 or around 9:00 o'clock, we took a path through the parking lot area of CBS, and then down the road and down the other side, and looked at a lot of different places, and then we arrived at that one. We talked it over for twenty minutes or so, and then I went in and made contact with the people inside the marine reserve building.

Q Did you, during that time, did you make an examination of the entire premises of the CBS warehouse, visually?

A Well, no. There were trucks in front of it. I couldn't really, no.

Q At that time, did you drive to the rear area of the CBS warehouse?

A No, sir, I did not.

Q Did you ever make any visual observations of the rear area, the opposite side of the building from the loading platform, in connection with your investigation?

A No.

Q How many agents were there with you at the time that you arrived at 9:00 o'clock in the morning on March 13th?

A Only one other.

Q And that was Agent Pecoraro?

A That's correct.

Q There came a time when other agents arrived on the scene; is that correct?

A That's true.

Q At about what time did the next agent or agents arrive?

A Well, it was after we were already set up in the -- well, what I call the marine building.

Q Okay. And who and how many and when?

A Let's see. There was Agent Goode, came up briefly. I would say 11:00, 11:30. It was an agent Pistone, I believe, that came up. I think there was one other; I don't recall who he was.

Q At the time that the shipments began arriving, and by the shipments I refer to the Hertz truck and the two vans, how many agents were in your surveillance position?

A I think only one. I think only John Goode came up for a very brief time.

Q So that would mean John Goode, Agent Pecorell and yourself; is that correct?

A To the best of my recollection, yes.

Q Some other agents who arrived, arrived after the shipment was completed or during the unloading?

A Well, most of them arrived after the truck left, but there were, there was one or two that were there during the unloading, yes.

Q Did any of the agents take up a position in any other location during the unloading, specifically, the wall or any other place?

A Not the wall, but in other areas, loosely around the 50th and 1st Avenue area.

Q Do you know whether any of those agents made a visual observation or surveillance at the rear areas of the CBS warehouse?

A I don't personally know, no, sir.

Q Did you ever drive around the CBS warehouse to the rear?

A I didn't personally, no.

Q When you moved from the surveillance position to the wall, were there people on the loading dock at that time?

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A Yes.

Q And I take it then you had to move in such a way as to move being undetected by those people?

A That's true.

Q Do you recall how many people were on the loading dock at the time you made that movement?

A How many? Well, there were the four that drove the truck; I believe Mor Wercberger was still driving the fork lift though he didn't stay there the whole time. I think by that time, Solomon Wercberger had left. I think Chaim Kahan was still there, although he was in and out, as well.

Q Did you take any photographs at the time that the unloading was taking place?

A No, sir, I did not.

Q Did anyone, any agent, to your knowledge, take photographs?

A No, sir, nobody did.

Q I take it that probably nobody had a camera with them; is that correct?

A No, no.

Q After the unloading was completed, how much time passed approximately, to the best of your recollection, until you entered the premises for purposes of executing the

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warrant?

A About, I'd say about thirty minutes.

Q When you arrived on the floor, the area where you were admitted to the CBS warehouse, I take it that was an upper floor; is that correct?

A CBS warehouse, yes.

Q What floor was it? Do you recall?

A I believe it was the fourth floor.

Q When you arrived on the fourth floor, would you describe what you were able to observe when you got out of the elevator?

A All right. Immediately to the left, well, almost immediately to the left, there were some cartons and then like an aisleway with the stacks of shipped cartons on pallets, but there was other merchandise, as well, throughout the whole area. It went all the way back, quite a large area.

Q All right. The area, the floor area of the warehouse, how would you describe it as to its capacity; was it full, was it empty, was it half-full?

A I would say mostly full.

Q All right. Were there areas where again, I take it, that you went through the entire floor for purposes of executing the search warrant?

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A We went through about three floors.

Q And directing your attention to the fourth floor, then, I take it that you and other agents made an examination of the general contents of that floor?

A Yes.

Q And in order to do that, you went up and down the aisles and looked at boxes and the labels and numbers on those boxes?

A That's right.

Q And can you, well, approximately how many aisles are there on the fourth floor?

A It's been two years. Gee, I really guess ten, maybe fifteen.

Q Ten or fifteen aisles on the fourth floor?

A Yes.

Q And again, to the best of your recollection, approximately how long is an aisle?

MR. YOUTT: Let me withdraw that and ask the following question.

Q Do the aisles on the fourth floor run the entire length and width of the building, to the best of your knowledge?

A Yes.

Q So that the lengthwise aisles would be as long

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as the building, and the width aisles would be as wide as the building; is that correct?

A I think some of them were shorter, some of the aisles going sideways were a little bit shorter, and I think there might be something obstructing that and continue on like around there. It's like a maze, almost.

Q Is the elevator located, when you got off the elevator, did you get off at one end of the building or did you go off it in the middle of the building? If you recall, or where?

A I believe you get in, you get off at the end of the building.

Let's say the first section of the building, anyway, because I think there are cartons actually behind the elevator.

Q Now, at the time that you were on the fourth floor, I take it that you had a list of some sort of the numbers of these shipped products which had been reported stolen?

A That's correct.

Q Where did you obtain that list?

A Well, I -- I had the case, so to speak, and obtained that list via a telephone call to it and Agents out of our New Haven division, who obtained it from the Warner-

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Lambert Company.

Q That list has a breakdown of the various types of products which had been in the load which was stolen?

A I know we received a teletype later. I'm not sure if I had that at that time. I did have a breakdown as to the numbers on the cartons and the amount of the cartons.

Q By number, are you referring to a specification number?

A Yes.

Q And amounts that mentioned the number of cartons that were on the load; is that correct?

A That's correct.

Q So your recollection was there was a number of different specification numbers indicating different products?

A That's correct.

Q And at the time that you entered the fourth floor of the CBS warehouse, you had in your possession a breakdown which indicated the varying products which were taken by serial numbers; is that correct?

A That's correct.

Q Do you recall when you obtained that list?

A I had them on the 12th.

Q So then before you went out to the CBS warehouse, you had that list?

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A Yes.

Q And did you use that list for purposes of evaluating whether or not these Schick products which you have found were in fact part of the stolen shipment?

A Yes, I did.

Q And in doing that, I take it you made several comparisons of several specification numbers; is that correct?

A Yes, I did.

Q What did you do with your list on March 13th?

A I still have it.

Q You still have it. Did you write it down in hand or is it a teletyped list?

A It's a handwritten list.

Q That you got from telephone information from the New Haven office; is that correct?

A Yes.

Q Do you have that with you?

A I believe Mr. Corcoran has it.

MR. CORCORAN: Are you referring -- I don't --

THE WITNESS: Well, for purposes of clarification, that list is what I used to transcribe on, to type the typewritten list; it would be the same thing, basically.

THE COURT: You're talking about the list in the 3500-1?

MR. YOUTT: 6. May we refer to it by that number in identifying it?

THE COURT: Yes.

MR. CORCORAN: Your Honor, could we have instruction as to what the 3500 material is?

THE COURT: 3500 material is statements of a witness that the Government is required to turn over to the examining lawyer.

Q I am handing you, Agent, what has been marked for identification as 3500, Exhibit 3500-6; would you tell me what that is?

A It is a standard format we use in a FBI report which is just a dictation by me, shows my initial up at the top, about what was aboard a trailer, what was hijacked on such-and-such a date.

Q And I take it you prepared that list and that statement?

A Yes, I did.

Q Can you tell from the face of the statement on what date you prepared it?

THE COURT: Would you like to see another copy?

THE WITNESS: I didn't put the date on it, did I? Normally, I would say by communication at the

New Haven office of the FBI, advised such-and-such a date, but there's no date on it.

Q Do you have a recollection of whether you prepared that report you have before you in or before March of 1975 or later?

A Yes, I did.

Q It was in March?

A In March, yes.

Q Well, do you have any more specific recollection as to when you prepared it in relation to March 13th?

A It would have been the next week.

Q And from your, then your handwritten note, you would have dictated or in some way written down for transcription the list which now appears as Government's Exhibit 3500-6 for identification?

A Yes, that's correct.

Q And those were the numbers you had with you then commencing March 12th?

A Yes, sir.

Q Now, after you arrived on the 12th, in describing the CBS warehouse, do you know whether or who occupied the first three floors of this CBS warehouse?

A No, sir, I don't.

Q In March of 1975?

Dowd-cross

A I don't know.

Q What floors did you go through in executing the search warrant?

A Four, five and six, and if there is a seven, seven.

Q In other words, every floor from four and above is that correct?

A That's correct.

Q Is that because the floors below the fourth floor were not occupied by the CBS warehouse?

A I couldn't be certain about that.

Q Okay, you are --

A There are agents who knew. I didn't personally know.

Q Do you know whether other agents looked through other floors?

A No, I'm sure they didn't.

Q You are sure they did not?

A I am sure they did not.

Q And your search warrant was to authorize the search of the CBS warehouse premises; is that correct?

A Yes.

(continued next page)

Q When you conducted the search of CBS Warehouse, I take it you went on all floors with the other agents that were conducting the search?

A Later on I did, yes, sir.

Q Did any of the defendants in this case who are sitting at the counsel's table accompany you or accompany the group that you were with?

A I don't specifically recall which ones; I think one did, yes.

Q Was that before or after the time that you spoke with Mr. Kahan and Mr. Wercberger?

A As a matter of fact, I think it Jacob Fisher that took us around.

Q He's not a defendant in this case, is he not?

A No.

Q He was an employee in the warehouse at the time?

A Yes.

Q Do you recall whether at that time you advised -- strike that.

When you did -- Did you conduct the search before or after the time when you spoke with Mr. Kahan and were present at the discussions of your partners with Mr. Wercberger?

A Did I conduct the search before or after that?

Q That's correct.

A When we walked off the elevator the cartons were right there,so that was part of the search, and other agents continued to search.

Q You, yourself, did not go up and down through the aisles, then?

A No, not then.

Well, I went to the back and came back over, maybe a period of about ten or fifteen minutes expired and then we began interviewing Mr. Mor Wercberger and Chiam Kahan.

Q And then it was after your interviews that you then went to all of the floors; is that correct?

A Yes, that's correct.

Q Now, the officers of CBS Warehouse were on what floor?

A Fourth floor.

Q Are there offices or were there offices at this time on the sixth, sixth and seventh floors?

A There may have been, I don't remember if there were.

Q Were there employees present on the upper floors at the time when you participated in the search of the premises?

A Not that I recall.

Q There were employees, were there not, on the fourth floor at the time when you arrived?

A Yes, that's correct.

Q Do you remember how many employees were there?

A Two.

Q Do you recall how many employees of the CBS Warehouse were there, in total?

A Yes.

Q How many?

A Four.

Q Were you present at the interview of Mr. Mor Wercberger?

A I was present, but I was engaged in other activities. I heard some of it, some of it I did not.

Q Did you at any point, were you present at, I believe you testified that Mr. Kahan was taken outside and interviewed further; is that correct?

A Well, he wasn't taken out, he was asked outside by other agents, yes.

Q You were not present at the interview of Mr. Chiam Kahan that took place outside, were you?

A No, sir, I was not.

Q Did there come a point when Mr. Solomon Wercberger returned to the premisas?

A Yes.

Q When was that in relation to your arrival?

A Well, he was reached by phone, I'm not entirely sure who, whether he called in or he was called by More or Chiam; it was after the search had taken place, maybe around, I don't know, 5:30.

Q And were you present when he arrived then?

A Yes.

Q Did you take part in the interview of Mr. Solomon Wercberger?

A We didn't really interview him as such, he was and then we gave him a rights form and -- No, we really didn't interview him, I don't think, no.

MR. YOUTT: May I have one moment, your Honor?

THE COURT: Yes.

MR. YOUTT: I have no further questions.

THE COURT: Any redirect, Mr. Corcoran?

MR. CORCORAN: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. CORCORAN:

Q Mr. Dowd, did each of the defendants acknowledge their individual postions at the CBS Warehouse when you interviewed them?

A Yes, they did.

Q What positions did they advise you they held?

A Mr. Chiam Kahan advised that he was the president of CBS. Mr. Mor Wercberger said that he was the treasurer of CBS, and Mr. Solomon Wercberger advised that he was the secretary of CBS.

Q And you saw each of those individuals out on the platform as the Shick products were being unloaded; is that correct?

A That's correct.

Q As a case agent, had you been advised of this theft by teletype on March 12, 1975, were you aware of the theft of the products, the theft of the Schick products on March 12, 1975?

A Yes, I was.

Q And did you, in fact, know the specification numbers at that time?

A Yes, I did.

Q Now, you testified, Mr. Dowd, that the fourth floor was fairly well filled at the CBS Warehouse?

A Yes, it was.

Q And the Schick products were in the aisles as you came in?

A Yes, they were.

Q You were present when Mr. Mor Wercberger was arrested?

A Yes, I was.

Q And his personal effects were searched?

A Yes.

Q Were you present when his wallets were searched?

A Yes.

Q Other than this list marked Government's exhibit 13, bearing the list of the Schick products that were stolen on March 11th, did Mr. Mor Wercberger have a list of any of the other products found in his warehouse, on his person, in his wallet or anywhere else on his person?

A No, he did not.

Q This is the only list of products?

A Yes.

Q And this was located in his wallet?

A That's correct.

MR. CORCORAN: Thank you. I have no further questions.

THE COURT: Anything, Mr. Youtt?

MR. YOUTT: Nothing further.

THE COURT: You may step down.

Your next witness?

MR. CORCORAN: The Government calls Patrick Colgan.

PATRICK COLGAN, called as a witness, having been duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: Please state your name and spell it for the record, please.

THE WITNESS: Patrick F. Colgan, C-o-l-g-a-n, Junior.

DIRECT EXAMINATION

BY MR. CORCORAN:

Q Mr. Colgan, by whom are you employed, sir?

A By the Federal Bureau of Investigation.

Q How long have you been with the FBI?

A Seven years.

Q In what capacity?

A I am Special Agent with them.

Q Are you assigned to any particular squad?

A I work on the truck hijacks, truck theft and major theft squad in our office.

Q Did you have any particular postion with that squad?

A I'm a relief supervisor and street coordinator for that particular squad, whose functions are to take the place of the supervisor when he's not available, and also to run any activities on the street that occur.

Q Calling your attention to March 13, 1975, were you working on that day, Mr. Colgan?

A Yes, I was.

Q And did you participate in the execution of a search warrant on that day?

A Yes, I did.

Q Where, sir?

A At a building in premises known as CBS Warehouse, foot of 50th Street, Brooklyn, New York.

Q Approximately what time did the search warrant get executed?

A 4:30 in the afternoon.

Q Did you have occasion at that time to meet with the defendants, Mor Wercberger and Chiam Kahan, and Solomon Wercberger?

A Yes, I did.

Q Would you indicate who those individuals are, as you know them?

A Mor Wercberger is seated at the head of the table. Mr. Chiam Kahan to his immediate left and Mr. Kahan's left Mr. Solomon Wercberger.

THE COURT: Let the record show the witness has pointed out the defendants, Chiam Kahan, Solomon Wercberger and Mor Wercberger.

Q After execution of that warrant -- withdrawn.

During the course of the execution of that warrant, did you find Schick products that you were looking for?

A Yes, we did.

Q And thereafter, did you have occasion to speak to the defendant Chiam Kahan?

A Yes, I did.

Q And what, if anything did you say to him and what did he say to you?

A The contact by myself and Agent Dowd with Mr. Kahan took place after the Schick products were found in the CBS Warehouse building, and it occurred in a small office area occupied by that firm.

Mr. Kahan was supplied a form called Interrogation Advice of Rights, which I believe I gave physically to Mr. Kahan. Then I orally gave him his Fifth and Sixth Amendment rights. and asked him to read the form, which also contained those same Fifth and Sixth Amendment rights. He subsequently stated he could read the English language and he understood the form, and did not wish to sign it.

Q Did you have a conversation with him at that point?

A Yes, I did. I informed Mr. Kahan in his warehouse was found a large quantity of Schick products that had been stolen a few days prior in Jersey, and Mr. Kahan told me that on March 12th there was a delivery of Schick products to his firm, in a Hertz rental truck, and he believed those goods to be owned by a firm called International Trading Company.

Mr. Kahan also stated that on March 13th a second delivery of Schick products was made in three separate vehicles. It was his belief, also, that these shipped products were also owned by International Trading Company.

Mr. Kahan went on to tell me that his firm received 1,673 Schich products on March 12th in a delivery and that his firm had documentation of that.

Q Did he indicate they had a bill of lading for the goods?

A Yes, they had a bill of lading and receipt for 1,673 items of Schick products for delivery the 12th.

Q Could you explain what a bill of lading is and a shipping receipt is, Mr. Colgan, explain that, if you will?

A A bill of lading is a document that gives authority for one person to transmit goods to another party. A receipt is a document that indicates the receiving of these particular goods by a consignee, or the owner of the goods from a truckman.

Q The receiver of goods generally gives a receipt to the trucker who brought the goods in; is that correc

A A copy.

Q And bill of lading would be from the truck driver to the individual receiving the goods?

A That's correct.

Q Did Mr. Kahan indicate he had certain documents for the 1,673 cartons of Schick products he had received on March 12th; is that correct?

A That's correct.

Q Did he claim to have rightful possession of those goods as a result of that documentation?

A That was his statement, yes.

Q Did you discuss the goods that he received on March 13th?

A Yes, I did. He told me he received a quantity of 3,030 items of the Schick products on the 13th, March 13, 1975, of which he stated he didn't think he had any paperwork for.

At that point, the interview went into what his position was with the company, and he informed me he was in charge of new business by contacting firms, by advertising in the Yellow Pages, and by accepting freight brought in by truckers just off the street.

Q Did Mr. Kahan indicate by what method he allegedly received those goods?

A Yes. He said occasionally a trucker unknown to him would come in and without proper paperwork and drop goods at his firm, CBS Warehouse. I did question him regarding the statement, absence of paperwork, and he simply stated it does happen, but in such cases his firm, CBS, gives a complete and accurate receipt of the goods obtained from the truckman.

Q Did you question Mr. Kahan about the charges of the alleged storage of goods?

A Yes, I did, but I don't recall exactly the figures related by him to me other than to state that I did discuss what the charges they made for storage.

Q Did you have any conversation with the defendant, Mor Wercberger, at that time?

A Yes, I did.

Q And what, if anything, did you say to him and what did he say to you?

A During the time that I gave Mr. Kahan the paper advice of rights form, I also supplied to same form to Mr. Moische Wercberger. During that same time, both individuals were given their Fifth and Sixth Amendment rights, orally by me, and at the same time Mr. Kahan stated he understood his form, so did Mr. Wercberger state the same, that he understood the English language, understood what was on the form, and understood his constitutional rights, but did not wish to sign.

Q Was Mr. Solomon Wercberger on the premises at the time you executed the search warrant?

A At the initial execution of the search warrant I don't believe he was. I don't recall seeing him, if he was.

Q Did he subsequently appear?

A Yes, he did. I saw him later in the afternoon.

Q What, if any, conversation did you have with the defendant Mor Wercberger after advising him of his rights?

A The sequence of events was that Mr. Kahan was interviewed by myself for a few minutes, as I just testified to, and while Mr. Mor Wercberger went and tried to obtain some documentation for the Schick products we found in his warehouse.

Mr. Moische Wercberger appeared shortly with a number of documents that he stated were documents showing proof that he had a right to have these goods in his possession. Mr. Wercberger did supply those forms to me.

Q I show you first, Agent Colgan, Government's exhibits 2 and 2-A, and ask you if you can identify those documents?

A Yes, I can.

Q What are they?

A Government's exhibit 2, is what I referred to earlier as a bill of lading, which in this case Mr. Wercberger informed me was the documents brought by the trucker on the delivery of March 12th.

Q Now, did Mr. Wercberger supply, Mor Wercberger, supply you with that document, Government's exhibit 2?

A Yes, he did.

Q And what did he say to you when he gave it to you?

A He stated that this was the document that the truckman representing International Trading brought in to him and indicating that on this truck was 1,654 razors and blades.

Q Did the name "International Trading" appear on that document?

A Yes, it does.

Q Is there any address for the company?

A No, it simply states "care of CBS Warehouse, foot of 50th Street, Brooklyn, New York," but consigned to "International Trading Company."

Q And Government's exhibit 2-A?

A This one was the piece of paper that Mr. Wercberger showed me, which is dated March 12, 1975, that he stated he gave the truckman who delivered the Schick products. This instrument is a receipt, it simply states, "International Trading," which is abbreviated, "one load, blades," with Mr. Wercberger's signature, which he admitted was his own signature.

Q Does the receipt allegedly given to the truck driver contain any specifications as to what type of product or how many cartons were involved?

A No. On the document, Mr. Wercberger told me was his receipt for the truckman, is simply no listing of any numbers pertaining to any quantity or cartons. It doesn't even list the type of commodity.

Q Did you question Mr. Mor Wercberger concerning the remaining Schick products found in the premises, those having been delivered on March 13th?

A That's correct, I did.

Q I show you Government's exhibit 3 and ask you if you can identify that?

A Yes, I can.

Q What is that?

A This document also was supplied me by Mr. Wercberger, indicated that on March 13, 1975, his firm had received 3,032 cartons of Schick products from Internationa Trading.

However, upon examination of this receipt that Mr. Wercberger supplied, also with the signature on it, I informed Mr. Wercberger that the name on the document he is indicating as the receipt, is not International Trading, but International, abbreviated, and the word "trucking."

Q Is that handwritten, sir?

A That's correct.

Q And that's a standard form, is it not?

A To me this is not a standard receipt, it was what Mr. Wercberger handed to me.

Q It's a CBS form?

A That, this is his receipt to the trucker.

Q Does it indicate on this how many -- withdrawn.

Does it indicate on that alleged receipt what type of product he received on the 13th of March?

A No, it does not. It simply lists 3,032 cartons, three loads, and Mr. Wercberger's signature. It does not list what commodity or who produced this commodity on this receipt.

Q Did Mr. Wercberger or Mr. Kan or Solomon Wercberger produce a bill of lading from a truck driver, entitling them to have the 3,000 products of Schick products which they had in their warehouse on the 13th of March?

A No, no bill of lading from the truck driver was produced by any member of CBS, as regarding the shipment of the 13th.

Q The only piece of paper they had regarding those three thousand some-odd cartons, was the receipt in the handwriting of Mr. Mor Wercberger; is that correct?

A That's corect.

Q Were the words "International Trucking" at the top?

A That's correct.

Q No address?

A No address.

Q Did you question Mr. Mor Wercberger about these facts?

A Yes, I did. I asked Mr. Wercberger, specifically regarding the shipment of March 12th, the day before, why on the bill of lading supplied by the truckman, the quantity of 1,654 packages appeared, and why no quantity appears on his receipt to the truckman.

He later supplied further documents that indicate on internal CBS letterhead, that there were actually only 1,606 Schick products deliverd and not 1,654. He could not offer an explanation for the difference.

Q I show you Government's exhibit 2-B, C, D and E, and ask you if you can identify those documents?

A Yes, I can.

Q What are they, sir; from whom did you receive them?

A These again were supplied to me, were supplied to me by Mr. Wercberger at the same time as the other documents we just discussed.

I asked Mr. Wercberger if he would explain to me some of the internal operations of his company, specifically, the billing procedure, at which time he showed me Government's exhibits 2-C and 2-E and stated again that this referred to the shipment delivered on March 12th of Schich products.

One of these items, CBS Warehouse, Inc., is an invoice which lists 1,606 cartons on it and is dated March 13th. The other document he supplied, indicating the delivery on the 12th of 1,606 pieces, is a receipt and though this receipt has five, approximately, yes, five lines of a complete breakdown or manifest of what was delivered on the 12th.

Mr. Wercberger stated to me that it is his company's policy that after delivery is made, that both a receipt and invoice is made up and then sent to the person who sent the goods into his firm, or to the company who had asked CBS to store the goods.

I questioned Mr. Wercberger as to where he was going to send the bills and invoice and he stated that he was not going to send these, because there's no address on them.

At this time, I asked him what is the procedure and he stated he would wait until the goods were picked up before he would receive any money, he said that this occasionally happens.

Q Other than those documents provided, did Mr. Mor Wercberger, Chiam Kahan or Solomon Wercberger offer any other documentation in support of their possession of the 5,072 cartons of Schick products taken out of the warehouse on March 13th?

A Yes. There were two other documents, again supplied at the same time by Mr. Wercberger. One of these documents is what I was told was an internal inventory card which lists the five separate items on the invoice, where they're stored, and would indicate how many of each type item would be taken out in the future, by the owner of the goods, if that ever occurred.

The other document was a sheet of paper simply labelled "CBS" that Mr. Wercberger said indicates 1,606 items of Schick were received by CBS on March 12th. All the documentation supplied by Mr. Wercberger except for the one piece of paper referred to the delivery on March 12th.

Q Other than the alleged bill of lading from the truck, all the documentation for the March 12th delivery indicated how many cartons had been received?

A 1,606, according to CBS' records.

Q And how much were, allegedly, were they responsible for according to the bill of lading provided by the truck driver?

the truck driver?

A 1,654.

Q And is this document allegedly a receipt of the only documentation as to the remainder of that load; is that correct?

A That's correct.

Q Did you question Mr. Wercberger or Mr. Kahan as to why the documentation showed a total of 4,638 cartons while 5,072 were found in the warehouse?

A I don't believe I worded the question exactly like that. I did ask why there was a discrepancy between 1,654 delivered by the bill of lading and the trucker and his firm showed only receipt of 1,606, and Mr. Wercberger did not have an answer for that question.

Q Agent Colgan, prior to March 13, 1975, when you executed this search warrant and took from CBS Warehouse the Schick cartons stolen a day and a half earlier, had you ever been up to the CBS Warehouse at 50th Street and First Avenue in Brooklyn?

A Yes, I had been.

Q Had you ever spoken to Mr. Chiam Kahan and Mr. Wercberger prior to March 13, 1975?

A Yes, I had.

MR. YOUTT: Objection, your Honor.

THE COURT: Overruled; I'll allow it.

Q On what occasion, sir?

A Approximately one month, five weeks before on February 4, 1975.

Q And for what purpose had you gone to the warehouse on that day?

A We had received information that there was a stolen load of Whitehall laboratory products which included Anacin tablets and different cosmetic type items stored in CBS Warehouse.

Q And did you, in fact, locate those items at the CBS Warehouse in February?

A Myself and other agents went to that warehouse and interviewed both Mr. Moische Wercberger and Solomon Wercberger and Solomon Kahan, and requested and got a consent search, at which time we did find a large quantity of these stolen items.

THE COURT: I'd like to charge the jury that the purpose of this testimony is credited, the Government is attempting to show a prior similar act.

In other words, the possession of goods allegedly stolen or otherwise illegally obtained by third persons.

Now, Mr. Colgan stated that they received this stolen merchandise. Well, that's a conclusion. The

Government will first have to present evidence to show that the merchandise was stolen, and if the Government has failed to do that, you disregard this evidence, or, I want to confine it to stolen or otherwise obtained illegally by third persons.

If the Government shows all that, and they convince you that there was a prior similar crime, that evidence is admissible solely on the question of criminal intent; you cannot and you may not find a defendant guilty of the crime charged if it's not prove on the theory that the Government did prove another crime. The defendant is obliged to answer only the charge in the indictment, but on the question as to whether the defendant, and I use it in the collective term, either singularly or plural, knew that the Schick razors were stolen, you may consider the other evidence if you credit it, and it you determine whether in this instance, the instance in which the defendant is charge the defendant was aware that the Schick merchandise or products were stolen, and only for that purpose, that I am allowing a proof of prior similar crime.

Q Agent Colgan, I ask you to examine Government's exhibit 6 marked for identification. Have you seen that document or the original thereof before?

A Yes, I have.

Q When, sir?

A On February 4, 1975, a copy of this document was supplied to me by Mr. Moishe Wercberger, when I was present at CBS, conducting an investigation into a stolen shipment of Whitehall Laboratory products. Mr. Wercberger supplied me this instrument, which is a bill of lading, also indicating that he had received this merchandise from a truckman that was consigned to a Mr. A. Perez in Sao Paulo, Brazil, and was to be stored in CBS Warehouse, and on the document, a thorough breakdown of what was delivered to CBS.

Q And did you obtain that document and bill of lading allegedly received by Mr. Wercberger in connection with the goods that you took out of CBS premises on February 4, 1975?

A That's correct.

MR. CORCORAN: Thank you. I have no further questions at this time.

At this time, your Honor, I would offer in evidence Government's Exhibit 2-B,C, I'm sorry, 2, 2-A, B, C, D and E, Government's Exhibit 3 and Government's Exhibit 6.

THE COURT: Any objection, Mr. Youtt and in addition to those previously marked, with

2 reference to the receipt of Whitehall.

MR. YOUTT: No objection, your Honor.

THE COURT: Then let it be marked.

(Government's Exhibit 2, 2A, B, C. D, E, Government's Exhibit 3 and 6, previously marked for identification are now marked in evidence.)

THE COURT: Would you like to conduct your examination now?

MR. YOUTT: I'm sorry, your Honor?

THE COURT: Would you prefer to suspend at this time, Mr. Youtt, and conduct your examination of Mr. Colgan tomorrow?

MR. YOUTT: Yes, I would, your Honor.

THE COURT: All right, then we're getting close to 5:00 o'clock.

MR. CORCORAN: I have no objection.

THE COURT: All right, let's mark these.

THE CLERK: Government Exhibit 13 marked for identification is now marked in evidence.

THE COURT: We will suspend at this time. The case will continue promptly at 10:00 o'clock tomorrow morning.

I ask everyone to get here on time, so that we can start promptly, and that means you should get

3 into the courthouse between 9:30 and 20 of 10:00, register with the clerk townstairs and then come to the jury room adjoining the courtroom immediately after.

The jury is excused.

You may step down.

THE WITNESS: Thank you, your Honor.

THE COURT: Can you tell me at this point, who much longer are you going to take?

MR. CORCORAN: I would think, your Honor, well, ifthere is as little cross-examination tomorrow as today, we should be finished by Thursday morning.

THE COURT: Can you tell me at this point, whether the defendant intends to put in a case?

MR. YOUTT: The defendant intends at this time to testify, your Honor, all three defendants.

THE COURT: So that I want to make certain that the case will not end this week, and by that I mean I have a problem with another nonjury case that is supposed to start next Monday, but since I'll be in the Court of Appeals on Friday it appears that it will not end, this case will not end this week and it will go over to Monday or Tuesday; is that a fair estimate?

4

MR. YOUTT: Based on Mr. Corcoran's extimate, I would guess that probably would be true,

THE COURT: So, it's a pretty good chance it will be then completed by either Tuesday or Wednesday.

MR. CORCORAN: I think it would be completed Monday sometime.

MR. YOUTT: Monday to Tuesday.

THE COURT: The entire case Monday?

MR. YOUTT: I don't anticipate my case to take nearly as long as Mr. Corcoran's case, I would need a day.

MR. CORCORAN: I would think some rebuttal then.

THE COURT: Then what I would want is --

MR. YOUTT: Your Honor, I'm wondering if it would be possible for me to obtain the 3500 material for tomorrow's session?

THE COURT: Yes. I expect you to turn it over at this point.

MR. CORCORAN: I will do that.

THE COURT: I thought you had already received the 3500 material and Mr. Colgan had testified in the hearing --

MR. YOUTT: I didn't receive it then, your Honor.

5

THE COURT: Do you have the material here?

MR. CORCORAN: I can provide it, the bulk of it to Mr. Youtt if he comes upstairs.

THE COURT: He should have all of it so that he can start his examination.

MR. CORCORAN: I agree, he should have it in advance of his direct testimony, not necessarily in advance of trial.

THE COURT: No, in adance of cross-examination, after the direct testimony.

MR. CORCORAN: I think he's got it in advance of the direct, as well.

THE COURT: That would be fine. Why to you say the bulk of it?

MR. CORCORAN: He certainly has, Mr. Colgan's; there is more of the 3500 material from --

THE COURT: That's all, that's all I mean.

MR. CORCORAN: I thought you meant the rest of the witnesses.

THE COURT: I can't direct you to give any others. My assumption is correct, did you get all of Mr. Colgan's?

MR. YOUTT: Mr. Colgan doesn't have any --

MR. CORCORAN: The statements of Mr. Kahan and Mr. Wercberger to the extent that Mr. Colgan's

Service of three ③ copies of the within is admitted this 1st day of June 19 77

United States Attorney for the Eastern District.

Joanne Brown

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U.S. ATTORNEY
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